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HEARD AND DETERMINED BY

THE JUDICIAL COMMITTEE

AND THE

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

REPORTED BY EDMUND F. MOORE, ESQ., M.A.,
ONE OF HER MAJESTY'S COUNSEL.

VOL. IV.—1871-73.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
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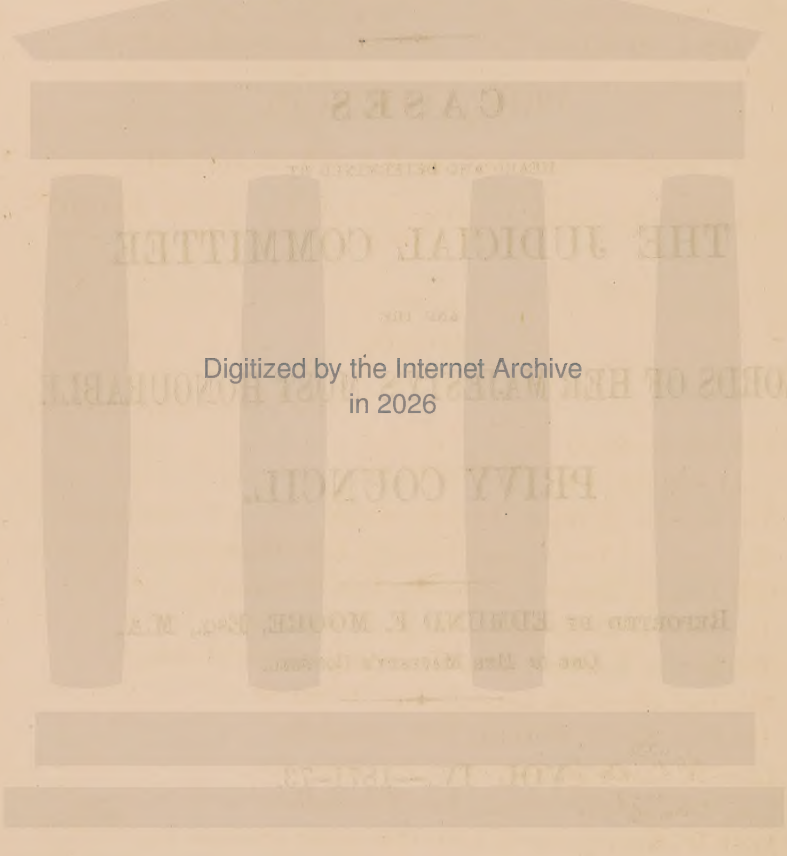

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Appeal Cases

BEFORE THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

THE OWNERS OF THE SCREW STEAMSHIP "JESMOND" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE SCREW STEAMSHIP "EARL OF ELGIN" . . . . . } RESPONDENTS.

J. C.*
1871
Nov. 13.

THE "JESMOND" AND THE "EARL OF ELGIN."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision—Admiralty Regulations for preventing collisions at Sea. Articles 13 and 16—Risk of collision.

Article 16 of the Admiralty Regulations for preventing collisions at Sea only applies when there is a continuous approaching of two Steamships.

When two Ships under steam "are meeting end on, or nearly end on, so as to involve risk of collision," as provided for in Article 13, and one of them at a proper distance ports her helm sufficiently to put her on a course which will carry her clear of the other, and enable her to pass on the port side, she thereby determines the risk, and is not approaching another Ship so as "to involve risk of collision" within the meaning of Article 16, and is not bound to slacken speed or stop.

A CAUSE of damage in respect of collision.

The appeal was brought from a decree of the High Court of Admiralty, by the Appellants, the Owners of the screw Steamship

* *Present:*—Sir James William Colvile, Sir Joseph Napier, Bart., and Sir Montague Smith.

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Jesmond, in a cause of damage instituted against the Respondents, the Owners of the screw Steamship *Earl of Elgin*, for the recovery of damages in respect of losses sustained by the Appellants by a collision which happened between the *Jesmond* and the *Earl of Elgin*.

The collision in question took place at about 10.30 P.M. or 11 P.M. on the 6th of May, 1870, off the coast of *Yorkshire*, about eight or nine miles N. by W. from the *Whitby Lights*. The *Jesmond* was a screw Steamer of 589 tons register, and was in water ballast, bound from *London* to the *Tyne*. She was under steam, and proceeding at the rate of about eight knots an hour. The *Earl of Elgin* was a Steamer of 608 tons register, and was bound from *Sunderland* to *Bordeaux* with a cargo of coals. She was also under steam, and proceeding at the rate of from seven to eight knots an hour. Each Vessel had her proper lights exhibited, and the weather was fine. The *Earl of Elgin* was struck about amidships on her starboard side by the stem of the *Jesmond*, with such violence that she foundered, and several of her crew were drowned. The course of the *Jesmond*, as stated in her petition, was N.N.W., and the course of the *Earl of Elgin*, as stated in her answer, was S.E.

The case set up by the *Jesmond* was, that the three lights of the *Earl of Elgin* were seen ahead, that the helm of the *Jesmond* was ported, and that just before the collision the engines of the *Jesmond* were stopped; and the *Earl of Elgin* was charged with having neglected to port her helm, and with having improperly starboarded.

On the part of the Owners of the *Earl of Elgin* it was contended, that the masthead and green light of the *Jesmond* were seen on the starboard bow of the *Earl of Elgin*, that the *Earl of Elgin* was kept on with a view to passing on the starboard side of the *Jesmond*, until the *Jesmond*, by porting her helm, opened her red light to the *Earl of Elgin*, causing immediate danger of collision, whereupon the helm of the *Earl of Elgin* was starboarded.

The cause was heard on the 13th of July, 1870, by the Judge of the Admiralty Court (The Right Hon. Sir *R. Phillimore*), assisted by Trinity Masters. A cross cause brought by the Owners of the *Earl of Elgin* against the *Jesmond* was heard at the same time and upon the same evidence, which was taken orally in Court.

The Judge, by his judgment, pronounced that both the Vessels

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were to blame for the collision, and, after stating the nature of the case and the evidence, he observed that: "The first question upon which the Court must come to a clear conclusion is, were these Vessels meeting end on, so as to bring them within what is called the Port-helm rule—the 13th Article of the Regulations for preventing collisions at Sea? that Article is as follows, 'If two Ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.' Each Vessel saw the other at a distance of about a mile and a half off; and the evidence appears to me, and also to the Elder Brethren of the Trinity House, to establish that these Vessels were meeting end on, in the sense of the rule which I have read. I, therefore, on the evidence given by the crew of the *Jesmond*, corroborated in these particulars by the evidence of the Witnesses to whom I have referred, on behalf of the *Earl of Elgin*, come to the conclusion—that these Vessels were meeting end on, so that it was incumbent upon them to put their helms to port, and, we have no doubt that, if they had done so, this collision would have been avoided. But there remains another very important question to be decided—I may say, two questions—which were put by the Admiralty Advocate; one is, whether the *Jesmond* did port sufficiently, having regard to the circumstances of this case? and the other is, whether the *Jesmond* ought not to have stopped her engines and the *Earl of Elgin* to have stopped hers. We think that the *Jesmond* did err in porting as slightly as she did. The evidence came to this,—she ported and then steadied, and did not port again till the collision became nearly inevitable; but it is not upon this ground that I should come to the conclusion, that such blame attaches to the *Jesmond* as to disentitle her to recover, if she succeeded on other points, but I mention it as a fault on the part of the *Jesmond*. The real blame that attaches to the *Jesmond* and the *Earl of Elgin* is, their not easing and stopping their engines before this collision took place. The more it is examined, the less defensible it appears, that two Steamers should be going at the joint speed of eighteen or nineteen miles an hour, nearly on opposite courses, seeing each other a mile and a half off, and not take the common precaution of stopping or easing their engines, under such circumstances. At all

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events, we have arrived at the conclusion that the rule contained in the 16th Article—that 'Every Steamship when approaching another Ship so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse'—has not been obeyed in this case, and I have no alternative but to pronounce that both parties are to blame for this collision." And it was decreed accordingly, but no order was made as to costs.

Both parties, by appeal and cross appeal, appealed from this decree.

Mr. *Butt*, Q.C., and Mr. *R. E. Webster*, for the Appellants, the Owners of the *Jesmond* :—

Contended that the Court below was not warranted by the evidence in finding that the non-observance by the *Jesmond* of Article 16 of the Admiralty Regulations for preventing collisions at Sea, so contributed to the collision as to disentitle the *Jesmond* to recover damage from the *Earl of Elgin;* that the evidence proved that the *Earl of Elgin* neglected to comply with Article 13 of those Regulations; that the collision was caused by the improper starboarding of the helm of the *Earl of Elgin*, and not by failure of the *Jesmond* and the *Earl of Elgin* to comply with Article 16 of the Admiralty Regulations; and insisted that the judgment of the Court below, instead of condemning both parties as equally to blame, ought to have been in favour of the Owners of the *Jesmond.*

The *Admiralty Advocate* (*Dr. Deane*, Q.C.), and Mr. *E. C. Clarkson*, for the Owners of the *Earl of Elgin* :—

Argued, that Article 16 of the Admiralty Regulations for preventing collisions at Sea, must be taken in combination with Article 13, and as supplementary to it. If, therefore, the Master of the *Jesmond* had reasonable cause to apprehend a collision, he was bound to apply the supplementary rule, and to ease the engines. If there was risk, not certainty, but probability or chance of a collision, he was bound to stop. If he thought he was under the Port-helm rule, it was his duty to carry out that rule so that there might be no mistake as to what he was doing. If he ported, as he says he did, he did not port enough, he ought to have slackened speed as well as ported. The 16th Article refers not to collision,

but to the risk of collision, and to the manner in which Steamers must act when there is risk of collision, and not absolute danger.

SIR JAMES W. COLVILE:—

In this case their Lordships must hold that it has been conclusively found that the two colliding Vessels were meeting each other end on or nearly end on within the meaning of the 13th of the Sailing Rules; that the *Jesmond*, in obedience to that rule, ported her helm, whether sufficiently or not is a question which will be afterwards considered; that the *Earl of Elgin* violated that rule by starboarding instead of porting, and thereby put herself clearly in the wrong, and became *primâ facie* responsible for the collision which took place. But the learned Judge of the Admiralty Court having found these facts, proceeds to say: "We think that the *Jesmond* did err in porting as slightly as she did. The evidence came to this,—she ported and then steadied, and did not port again till the collision became nearly inevitable; but it is not upon this ground that I should come to the conclusion, that such blame attaches to the *Jesmond* as to disentitle her to recover if she succeeded on other points, but I mention it as a fault on the part of the *Jesmond*. The real blame that attaches to the *Jesmond* and the *Earl of Elgin* is, their not easing and stopping their engines before this collision took place. The more it is examined the less defensible it appears that two Steamers should be going at the joint speed of eighteen or nineteen miles an hour, nearly on opposite courses, seeing each other a mile and a half off, and not take the common precaution of stopping or easing their engines under such circumstances."

That part of the judgment, therefore, raises two propositions—first, that the *Jesmond* did not port sufficiently, but at the same time qualifies that finding by saying, that of itself that circumstance would not disentitle the *Jesmond* to recover. The learned Judge, however, as their Lordships understand his judgment, would couple the insufficiency of the porting with an assumed obligation to slacken the speed under the 16th Article, and finds that, under the whole circumstances of the case, the *Jesmond* ought to have slackened as well as the *Earl of Elgin*, and that by reason of that fault on the part of the *Jesmond*, the damage, according to

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the rule of the Court of Admiralty, is divisible between the two Vessels.

Their Lordships think that it will be desirable in dealing with these two propositions to deal with them, in the first instance at least, separately, as has been done in the argument. They see no reason to doubt the truth of the evidence given by the Witness, *Hall*, the second Mate of the *Jesmond*. They believe upon his evidence—and the learned Judge of the Court of Admiralty has certainly not found that that evidence was to be disbelieved—that when the three lights of the *Earl of Elgin* were first seen, the order to port the helm was given. They believe that the Vessel paid off upon a port-helm a point and a half, but that before she had gone so far the Mate had given the order to steady the helm, which ultimately brought back the Vessel to within half a point of her original course. Their Lordships were urged by Dr. *Deane* in his able argument to consult upon this point the nautical Gentlemen by whom they are assisted. They have done so, and those Gentlemen, so far from finding, as Dr. *Deane* expected, that the evidence must be inaccurate in asserting that the Vessel went so far under the port-helm as to pay off a point and a half, think that there is nothing inconsistent or unreasonable in that statement; on the contrary, that upon principles of navigation the fact is credible and what might be expected. Their Lordships, therefore, accept the statement of the Witness as given. Again the nautical Assessors also concur in thinking that the *Jesmond* having paid off so far as a point and a half was, though brought back within half a point of her original course when the helm was steadied, placed upon a line on which she would have gone clear of the other Vessel if the latter had even kept her course; that she had brought the two Vessels in the position of red light to red light, and that the danger of the collision was at an end. *A fortiori*, if the *Earl of Elgin* had obeyed the rule and had done what she was bound to do, namely, port her helm, the distance between the two Vessels would have been increased, and the collision would have become still more improbable. That being the state of the case, their Lordships cannot concur with the learned Judge in thinking that the alleged insufficiency of the porting did in any degree contribute to the accident.

They next proceed to consider whether they ought to hold that those on board the *Jesmond* in omitting to slacken the speed of their Vessel were guilty of a default which justifies the judgment under appeal. Now the 16th Article says: "Every Steamship when approaching another Ship so as to involve risk of collision shall slacken her speed." It is not necessary to read further, because nobody contends that the *Jesmond* was bound to stop and reverse her engines except at the moment when a reversal of the engines had almost become impossible, namely, when the other Vessel was nearly run into. The Article imposes this obligation only upon a Ship which is "approaching another Ship so as to involve risk of collision." It may be said, that there was a moment at which the two Vessels were in that condition, for if they had not been in that condition they would not have been within Article 13. But it seems to their Lordships, taking the two Articles together, that Article 16 only applies when there is a continuous approaching of the two Ships, and, indeed, it was admitted candidly by Dr. *Deane* that there was not an obligation to slacken the speed the moment the two Vessels sighted each other, and when the first porting took place. If their Lordships are right in their view of what was then done, the original risk of collision was determined when the Vessels were brought port light to port light. Nor can it be said that after that porting the *Jesmond* was approaching the *Earl of Elgin* so as to involve a risk of collision, unless the true construction of the term "risk of collision" be that for which in one part of his argument Dr. *Deane* contended. As their Lordships understood his argument, he was prepared to insist that the term must be taken to include either a default on the part of the other Vessel to do what the 13th Rule required of it, or the disabling of that Vessel by some accidental cause of which the *Jesmond* was not, and probably could not be aware. It does not appear to their Lordships that the first of those elements can be reasonably imported into the risk of collision; there is no foundation in fact for supposing that "the *Earl of Elgin* was prevented by any accident from doing what she ought to have done;" nor are their Lordships aware that in obeying these Rules it is necessary for persons navigating Vessels to foresee and to provide against every possible accident.

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Their Lordships would be extremely sorry, by any decision of theirs, to diminish the stringency of any rule tending to prevent the great loss of property and destruction of life which are but too common in our narrow Seas; but they do not feel at liberty to extend the application of the 16th Article beyond what seems to them to be its proper construction, and, therefore, they must respectfully differ from the learned Judge in what he has found with respect to the obligation which lay upon the Master and crew of the *Jesmond*.

The result, therefore, will be, that their Lordships will humbly advise Her Majesty to allow the present appeal; and to declare and order that the *Earl of Elgin* was solely responsible for the collision, and must be condemned in damages accordingly, and of course the costs in the Court below and the costs here will, according to the ordinary rule, follow the result.

Solicitor for the Appellants: *Thomas Cooper.*
Solicitors for the Respondents: *Lowness, Nelson, & Jones.*

J. C.* 1871 — *Nov.* 16.

JOHN HARVEY AND OTHERS . . . . . APPELLANTS;

AND

THE OWNERS OF THE SCREW STEAMSHIP "EUXINE" . . . . . } RESPONDENTS.

THE "EUXINE."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF MALTA.

Practice—Proxies in Vice-Admiralty Courts—Strict proof of, not requisite under § 40 of the Rules and Regulations for Vice-Admiralty Courts abroad

It is the practice in the High Court of Admiralty as to Proxies, for Proctors to proceed without the exhibition of a Proxy until called upon to produce it; and when called on they satisfy the requisite requirement, by stating the names of the parties for whom they appear.

Such practice, in this respect, is the same in the Vice-Admiralty Courts

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* *Present:*—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR JOSEPH NAPIER, BART., and SIR MONTAGUE SMITH.

abroad, where Proctors are not bound to do more under § 40 of the Rules and Regulations made in pursuance of the Statute, 2 Will. 4, c. 51, s. 1, and Order in Council of the 27th of June, 1832, unless called upon to do so by an Order of the Court.

The production of a Proxy which, on the face of it, is duly signed and sealed, is a sufficient compliance with an Order of the Court to produce the Proxy, without proof of the handwriting of the subscribing Witnesses; the *onus* of proof of the insufficiency of the Proxy, if questioned, is on the party impeaching it.

An objection to a suit on the ground of the non-production, or insufficient proof, of a Proxy, is a preliminary objection to be taken on motion and not by protest, and the proper course for the Vice-Admiralty Court, in such circumstances, is to stay the proceedings for the production of proof until sufficient evidence is produced, and not to allow the cause to proceed to a hearing, and then dismiss the suit on the ground that there was no sufficient proof of the Proxy.

IN this case the appeal was brought from a decree of the Vice-Admiralty Court of *Malta*, upon the Protest of the Master of the French steamship *Euxine*, to, *inter alia*, the sufficiency of the Proxy, in a suit instituted on behalf of the Appellants against the *Euxine*, in the Vice-Admiralty Court of *Malta*. By such decree, the Judge pronounced for the Protest, and dismissed the suit with costs.

The Appellants, *John Harvey* and *William Benjamin Harvey*, were the Owners of the English brig *Clymping*; and *Emin Schemeil* and *Bichara Schemeil*, carrying on business at *Liverpool* as Merchants under the style of *Schemeil Brothers & Co.*, were the Owners of the cargo of cotton-seed laden on board the Brig, and *George Hedgecock* was the Master and others were the crew. The Respondents were the Owners of the *Euxine*, belonging to *Marseilles*, and carrying on business at that City as the Firm of *Fraissinet, père et fils.*

The suit arose out of a collision between the *Euxine* and the *Clymping*, which occurred on the 2nd of June, 1870, and occasioned the total loss of the *Clymping*. The action was commenced on the 16th of July, 1870, by *William John Stevens*, as Proctor for the Owners of the *Clymping*, for the Owners of the cargo of cotton-seed then lately laden on board the Brig, for the Master and the crew of the Brig as Owners of their private effects, and for *J. A. W. Harper*, represented at *Malta* by *Leonard*, a partner

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in the Firm of *Robinson, Duckworth, & Co.*, Bankers, &c., who entered an action and proceeding in the Vice-Admiralty Court, for the sum of £10,000, against the *Euxine*, her tackle, apparel, and furniture.

At the time of entering the action the Proctor exhibited, and left in the Registry of the Court, an affidavit sworn by *Leonard*, which, in form and substance, complied with the requirements of the Rules and Regulations made pursuant to the Statute, 2 Will. 4, c. 51, and the Order in Council of the 27th of June, 1832, regulating the practice of Vice-Admiralty Courts abroad, and had annexed a Telegram received by him on the 13th of July, 1870, purporting to be a direction from the Secretary of the Salvage Committee at *Lloyd's, London*, to seize the *Euxine* at the suit of the Appellants. On the same day the Judge decreed the Warrant of arrest to issue, under which the *Euxine* was arrested.

On the 19th of July, 1870, an appearance under protest to the suit was entered on behalf of the Master of the *Euxine*.

The Proctor for the *Euxine* on the 1st of August filed his petition upon protest, which alleged: first, that there being a Court of Commerce in *Malta*, the Vice-Admiralty Court had no jurisdiction to try the suit; secondly, that the title and authority of *Leonard* was insufficient and illegal, it being merely in virtue of a telegraphic despatch produced in the Registry of the Court, without giving the names and descriptions of all the parties claiming damage, and without documentary proof of the authenticity of such Telegram, which contained numerous other allegations in no way relevant to this appeal; and, thirdly, that the grounds of the suit, the damage alleged to have been done to the *Clymping* by the *Euxine*, had already been made the subject of a suit before the French Imperial Court at *Alexandria*, which Court had dismissed the claim on behalf of the *Clymping*, so that the cause was in fact *res judicata*, and could not be tried again before the Vice-Admiralty Court.

On the 12th of August, *William John Stevens* brought in an answer to the petition under protest, and in the name and as the Proctor holding a special Proxy of the Owners of the *Clymping*, of the Owners of her cargo, and of her Master and crew, alleged therein, that the title and authority of *Leonard* for entering the

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cause was sufficient and legal, it not being merely in virtue of the telegraphic despatch produced, but in virtue of written and duly signed confirmations thereof, and subsequent formal Proxies, or Powers of Attorney, to *Stevens*, the Proctor, containing the names and descriptions of the parties claiming damage.

A reply was filed on behalf of the Defendants, which, so far as it related to the appeal, alleged that as *Stevens* claimed to hold a special Proxy from the Plaintiffs, *Leonard* had no title to enter the action or now proceed therewith, and that the appearance of *Stevens* in the action was irregular and illegal.

The Defendants did not bring in any proofs in relation to the matters in question upon the appeal.

On the part of the Plaintiffs, *John Stevens* exhibited Proxies dated the 22nd of June, 1870, signed respectively by the Owners of the *Clymping*, by the Owners of her cargo, and by her Master and crew, which in similar terms nominated him, their true and lawful Proctor, to appear in their respective names before the Vice-Admiralty Court, and to prosecute the cause instituted therein against the *Euxine* on their behalf; he also proved that he had been retained from the 13th of July, 1870, as Proctor for the Plaintiffs in the suit. Evidence was also produced to prove that *John* and *William Benjamin Harvey* were Owners of the *Clymping*, and that *George Hedgecock* was her Master, and Messrs. *Schemeil Brothers & Co.* appeared by the Bill of lading of the Vessel to be consignees of her cargo. It was further proved that *Leonard* had received, besides the Telegram annexed to the affidavit to lead the Warrant of arrest, certain other Telegrams delivered by Messengers of the *Mediterranean Telegraphic Extension Company*, one of which, dated *London*, July 15th, 1870, contained a request from *Harvey* to take proceedings against the *Euxine*, and the other dated *Liverpool*, the 15th of July, from *Schemeil Brothers & Co.*, also authorizing such proceedings, and the transcripts of these telegrams were verified by affidavit and brought into Court.

The first two questions raised on the Protest were argued for several days, and on the 4th of October, 1870, the Judge of the Vice-Admiralty Court (Sir *Antonio Micallef*) pronounced two decrees, the first deciding in favour of the jurisdiction of the Court, and overruling the objections raised thereto in the petition on

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Protest with costs: and the second deciding, that it did not appear that *Leonard* and *Stevens* were persons legitimately authorized to represent the parties in whose name the action was instituted, and dismissing the suit with costs. The third question raised on the petition on Protest was not argued or disposed of.

The appeal to Her Majesty in Council was confined to the second of the above decrees.

Mr. *Butt*, Q.C., and Mr. *E. G. Gibson*, for the Appellants:—

The question raised in the appeal is one as to the authority of the Proctor to institute and continue the suit on behalf of the asserted Plaintiffs in the Court below. The Judge in that Court took objection in the first instance to the authority of *Leonard*, who made the affidavit to lead the Warrant of arrest, because in that affidavit, though he swore that he was the duly authorized Agent of the several parties interested, he stated his instructions to proceed against the *Euxine* to have been communicated by Telegram of the 12th of July, 1870, and did not produce sufficient proof of his title as Agent. Such an objection was wholly untenable, and does not require argument. *Leonard* was himself no party to the suit, and all questions as to his title and authority were immaterial and irrelevant under the circumstances. The affidavit was in the form prescribed by the Rules and Regulations for Vice-Admiralty Courts abroad, made pursuant to Statute 2 Will. 4, c. 51. The suit having commenced, the Vessel was arrested; an appearance under protest having been entered for the *Euxine*, and the sum of £10,000, the amount for which the Warrant of arrest was issued, paid into Court, the release of the Vessel was thereby procured. Afterwards, by leave of the Court, this sum was withdrawn, bail for the same amount being given. The protest against the authority of *Leonard* to lead the Warrant of arrest was met by an answer filed by the Proctor *Stevens*, in the name, and as the lawful Proctor holding special Proxies of all the several parties proceeded against, namely, the Respondents, the Owners of the Brig and cargo, and the Master and crew of the Vessel. It appears from the pleadings that the form of the Proxies was that prescribed and given in the precedents annexed to the Rules for Vice-Admiralty Courts abroad. The 40th section, while it recognises the propriety of requiring the

production of a Proxy to prevent Proctors from proceeding in causes from instructions from parties not being entitled to intervene, or not having a legal *personæ standi* to prosecute a cause, yet expressly says they are not usually exhibited in maritime causes: and Dr. *Lushington*, a most experienced Judge, says, in *The Whilelmine* (1), "that the demand for the exhibition of a Proxy is contrary to the ordinary practice of the Court," and that, as far as his experience extended, he was not aware of any instance within his recollection in which such a demand had been made. In another part of the same judgment he states, "that for a period of probably not less than two hundred years, Proctors have been permitted to appear on behalf of parties suing without being called upon to exhibit any proxy, as is the indispensable custom in Ecclesiastical Courts" (2). We submit and insist, therefore, that the suit was properly instituted on behalf of the Appellants. That the exhibition by the Proctor of the Proxies of his parties was sufficient proof of his authority to institute and prosecute the suit; and there was sufficient evidence on the part of the Appellants to shew that they were interested parties, and that they had authorized and adopted the suit. *Leonard* was no party to the suit, and all questions as to his title and authority were immaterial and irrelevant. There was no pretence upon the facts proved before the Vice-Admiralty Court for the dismissal of the suit.

Mr. *E. C. Clarkson*, and Mr. *Walter Phillimore*, for the Respondents:—

A Proxy, like a Power of Attorney, is an instrument under seal, giving authority to the party appointed to institute and prosecute a suit in its various stages, from the first process to the ultimate execution of the Sentence, and must be proved: *Burn's* Ecc. Law, Vol. iii., p. 376 [9th Ed. by *Phillimore*]. In Ecclesiastical causes the Proxy is called for and exhibited in almost every stage of a cause; *Coote's* Ecc. Courts Prac. p. 154—*passim*; and though the practice of requiring formal proof of the Proxy may have become relaxed in the Maritime Courts, yet the Warrant of Attorney, or Proxy, must be in the same form, and contain the same powers there as in the

(1) 1 W. Rob. Ad. Rep. 338.
(2) 1 W. Rob. Ad. Rep. 337; S. C. 2 Notes of Cases, 216.

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Ecclesiastical Courts; and as the requirement of a Proxy is the same in both Courts, the same rules, being equally applicable, must be applied: *Oughton, Ordo Judiciorum*, tit. xlviii.; *Clerke's Praxis Admiralitatis*, tit. 7; *Pritchard's* Ad. Dig. p. 302; *The Haidee* (1).

Now, there is no doubt that the ancient practice with regard to appearances was originally the same in Maritime as in Ecclesiastical Courts, namely, to require Proctors to exhibit Proxies from their Clients authorizing proceedings: *The Whilelmine* (2); that is stated by Dr. *Lushington*, whose judgment is relied on by the other side, and though the 40th section of the rules and regulations of the Vice-Admiralty Court does state, that "although Proxies are not usually exhibited in maritime suits," thus adopting the practice that is said to have prevailed for the last two hundred years, yet it goes on to say that "they may sometimes be required in order to prevent Proctors from proceeding in causes on instructions from parties not being themselves entitled to intervene, or not having a legal *personæ standi* to prosecute a cause." Thus giving the Judge, or the parties in the cause, a discretionary power, if they shall see fit to exercise it, to call for and examine the Proxy of the Proctor prosecuting or defending the action. The same practice has been in force in *Canada*, where the rules and regulations for proceeding in the Vice-Admiralty Courts prevail: *The Dumfriesshire* (3). That was a suit for the recovery of penalties under the *Passengers Act*, 5 & 6 Will. 4, c. 58, and shews that the non-production of a Proxy is a ground for the dismissal of a suit. The form of a Proxy is that of a Deed under seal, and it should be proved as such. If the Proxies had been attested before a Notary Public, under the Statute, 17 & 18 Vict. c. 78, s. 8, it would have been sufficient, as the seal of a Notary would have been accepted in our English Courts.

SIR ROBERT PHILLIMORE:—

This is an appeal from the Vice-Admiralty Court at *Malta*, raising questions of practice in Vice-Admiralty Courts. Their Lordships have no doubt at all as to the advice which it will be their duty to tender to Her Majesty upon this matter.

(1) 1 Notes of Cases, 597.
(2) 1 W. Rob. Ad. Rep. 337.
(3) Stuart's V.-Ad. Cases in Lower Canada, p. 245.

It appears that a suit was instituted in the Vice-Admiralty Court at *Malta* by an English ship, the *Clymping*, against a French ship, the *Euxine*, for a collision at Sea somewhere near *Alexandria*. The suit was instituted in that Court by a Proctor who appeared in the usual form, and stated the nature of the suit and his title to appear in the usual manner. It has been contended that he was duly called upon to produce a Proxy, and that having been so duly called upon he did not comply with the order, but produced an imperfect Document, which cannot be taken in law as being a Proxy, and, therefore, that the Judge of the Court below was justified in taking the course that he did take, namely, of dismissing the suit altogether.

With regard to the practice of the Court as to Proxies, it is very clearly laid down by that experienced Judge, Dr. *Lushington*, in the case of *The Whilelmine*. He says: "Now, looking to the ancient practice of the Court, it is perfectly clear that the rules, with regard to appearances in the Court of Admiralty were originally the same as are now adopted in the Ecclesiastical Courts. In the more modern practice of this Court these rules, it is true, have been relaxed for the convenience of the Practitioners, and for a period of probably not less than two hundred years Proctors have been permitted to appear on behalf of parties suing without being called upon to exhibit any Proxy, as is the indispensable custom in the Ecclesiastical Courts. The first question, then, which I must consider in the present instance is this: what is the duty and what the responsibility attaching upon a Proctor who so appears without exhibiting a Proxy? Upon general principle, I apprehend that the Court is entitled to expect from such Proctor when he does appear that he be duly authorized by some person having an interest in the cause in issue, or that he should have a justifiable and strong ground for believing that the individual for whom he appears has such an interest. I apprehend further, that at any period of the Cause, and at any time before the case is dismissed out of Court, the Court has a right to call upon that Proctor to state, not generally but specifically by name, the whole of the parties for whom he is authorized to appear. The authority of the Court to make this demand upon the Proctor is, I conceive, inherent in the jurisdiction of this

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Court, in common with all other Courts, and is absolutely essential to the due administration of justice for the purpose of preventing unauthorized litigation. If it were otherwise what would be the consequence in regard to the proceedings in this Court? The consequences would be that Proctors might appear for individuals who either were not in existence, or for persons who gave no authority, or who, assuming the names of others, might take the chance of a decree being made in their favour, without at any time being obnoxious to the consequences of an unsuccessful litigation." (1)

Now, it is quite clear from the passage of the judgment which I have read, first, that the usual practice is for Proctors in the Court of Admiralty to proceed without the exhibition of any Proxy, and, secondly, that when they are called upon for their Proxy they satisfy the law by stating the names of the parties for whom they are authorized to appear. Read by the light of this judgment, there appears to be no difficulty in construing the rules and regulations of the Vice-Admiralty Courts abroad, which were made at a subsequent period, one of which rules (sect. 40) is: "Although Proxies are not usually exhibited in maritime suits, yet they may sometimes be required, in order to prevent Proctors from proceeding in causes on instructions from parties not being themselves entitled to intervene, or not having a legal *personæ standi* to prosecute a cause."

In this case there is no question whatever that the Appellants before the Court, being the Owners of the cargo on board the Brig, and the Master and crew who appear, as is usual, as to their personal effects, are the parties who are really interested and entitled to prosecute the cause in this case. The objection which has been taken, has been truly said to be one of the most technical description. The Proxy is said not to have been duly signed and sealed, and it is said that there is no evidence of the handwriting of the Witnesses who appear to have subscribed the Instrument. The answer to that is, that if there had been a strict order of the Court (and none was made on this occasion) that they should produce their Proxy, there would have been a *primâ facie* compliance with that order by the production of those Instruments, and those

(1) 1 W. Rob. Ad. Rep. 336–7.

who sought to impugn their authenticity should have taken further steps in the matter.

It is also to be observed that great confusion appears in the pleadings of the Court below, and in the protest, because this is an objection which should have been taken separately and at once, and should not have been mixed up with other matters, as it appears to have been in this protest. Even if the argument of the Counsel for the Respondents could be sustained to its utmost extent, the duty of the Judge would have been no more than this, to have stayed proceedings until the doubt which they alleged with respect to the authenticity of the document could have been properly solved.

Upon all grounds, therefore,—upon the ground first of all, that there were no circumstances of suspicion in the case which warranted the departure from the usual admitted practice and called for the production of a special Proxy,—upon the ground that, if there were such circumstances, they were *primâ facie* fully complied with by the instruments which are before the Court on this occasion; further, that the objection ought to have been taken at the earliest period, and not mixed up with the other proceedings; and that the utmost the Court could have done in any case would have been to stay proceedings until further information could have been obtained,—their Lordships have no hesitation whatever in saying, that it will be their duty humbly to advise Her Majesty to reverse the Sentence of the Court below. Their Lordships think, that looking to the confusion which prevailed in the pleadings, the fault of which does not lie entirely upon one party but must be shared by both, no order should be made as to the costs of the appeal.

The costs in the Court below will be costs in the cause.

Solicitor for the Appellant: *Thomas Cooper.*
Solicitor for the Respondent: *Francis Kearsey.*

J. C.* 1871 *Nov.* 21, 22.

THOMAS NEWTON . . . . . APPELLANT;

AND

THE HON. C. A. TURNER, R. SPANKIE, AND G. D. TURNBULL, PUISNE JUDGES OF THE HIGH COURT, NORTH-WESTERN PROVINCES . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT, NORTH-WESTERN PROVINCES.

Barrister and Advocate—Order of suspension from practice—Professional misconduct.

Two Orders of the High Court of the *North-Western Provinces*, the one being an Order *nisi* calling on the Appellant, a Barrister and Advocate practising in that Court, to shew cause why he should not be suspended from the practice of his profession as an Advocate of that Court, and the other Order declaring him guilty of gross professional misconduct, and suspending him from practice for five years, on appeal, as to the rule on which the first Order was made discharged, and the second Order reversed; the Judicial Committee being of opinion, that, though the Appellant had been guilty of a grave irregularity and deserving of censure, yet the facts proved did not amount to that *mala praxis* on which the High Court, having regard to the position and functions of an Advocate in the *North-Western Provinces*, could fairly found any proceeding of a penal character.

THIS was an appeal from two Orders and judgments of the High Court, *Allahabad, North-Western Provinces*, dated the 13th and 27th of August, 1870, whereby the Appellant, a Barrister-at-law and an Advocate of the High Court of the *North-Western Provinces*, was suspended from practice, for alleged professional misconduct, liberty being given to him to apply at the expiration of five years for permission to resume practice.

The circumstances under which the Order of the 13th of August, 1870, was made arose out of a communication by Mr. *Bramly*, the Officiating Judge of the *Allyghur* District, dated the 19th day of July, 1870, to the Registrar of the High Court, *North-Western Provinces*, of proceedings held before him in consequence of two Letters addressed to him by the Administrator-General of *Calcutta*, dated the 10th of May and the 14th of June, 1870, regarding Mr. *Newton's* professional conduct in applying for Letters of adminis-

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tration on behalf of a Mrs. *Saunders* to the estate of her late son, when he knew she could not be entitled to such administration.

The Respondents, at that time the presiding Judges of the High Court, thereupon issued an Order and citation, dated the 30th of July, 1870, calling upon Appellant to give explanation, on the 13th of August, 1870, with reference to the imputations on his professional conduct, as alleged against him by Mr. *Bramly* in the communication above mentioned.

The Appellant, as directed, appeared in person on that day, and read out from a written statement, which he had verified, such explanation as he was able to afford, and which explanation was, to some extent, satisfactory, as he was relieved of one of the two charges contained in the citation of the 30th of July, 1870.

With reference to the other charge, the Respondents served the Appellant with a rule, dated the 13th of August, 1870, calling upon him to shew cause why he should not be suspended from practice, and also as to certain other charges which were not contained in the citation of the 30th of July, 1870.

The Appellant appeared by Counsel on the 27th of August, 1870, who read from a written statement signed by Appellant, but did otherwise orally address the Court. The Appellant also filed affidavits in disproof of the allegations made against him; and the Respondents, constituting the Court, though they admitted having too hastily assumed certain matters against the Appellant on the previous day of charge, declared that the Appellant had been guilty of gross professional misconduct, and passed an Order on the 27th of August, 1870, suspending him from practice for five years, with permission to apply for restoration to practice, if accompanied with certificates of character, at the expiration of such period.

The facts of the case, as well as the Orders of the Supreme Court, fully appear in the judgment of their Lordships.

On the 5th of January, 1871, the Appellant presented a petition, accompanied with grounds of appeal, to the High Court, for leave to appeal to Her Majesty in Council, and the Court granted a certificate allowing such appeal.

Sir *R. Palmer*, Q.C., and Mr. *W. Bush Cooper*, for the Appellant:—

Contended, first, that as Mr. *Bramly*, the Officiating Judge of the *Allyghur* District, was fully competent to admonish Appellant for any

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misconduct he might have conceived he had been guilty of at the time of such alleged misconduct occurring, and not having exercised such discretionary power, he acted illegally in forwarding an *ex parte* proceeding to the High Court reflecting on the Appellant's professional conduct, as set forth in the communication made by him on the 19th of July, 1870; that the High Court proceeding thereon had also acted illegally, especially in proceeding *ex mero motu* on such communication: *Emerson* v. *The Judges of the Supreme Court of Newfoundland* (1); and that the Order or citation, dated the 30th of July, 1870, being, therefore, illegally issued, all proceedings thereon were *ab initio* void: secondly, that the High Court acted illegally in proceeding *ex mero motu* as to the second rule or Order, dated the 13th of August, 1870, no one having applied for such rule, and all proceedings taken thereon were *ab initio* void: that the matters set forth in such second rule or Order of the 27th of August, 1870, being purely of a private character unconnected with Appellant's professional duties, and regarding which no one had preferred any complaint, not even Appellant's Client, Mrs. *Saunders*, the High Court's severe comments and Order were unmerited and illegally passed: and, lastly, that the misconduct imputed to the Appellant amounted at the utmost to an error of judgment or misconception of law, for which professional men are not subject to punishment.

Mr. *Shapter*, Q.C., for the Judges:—

Objected to the competency of the appeal, on the ground that as it was a criminal proceeding the High Court had no jurisdiction to allow the appeal, referring to sect. 30 of the Letters Patent, 17th March, 1866, establishing the High Court in the *North-Western Provinces*. On the merits he commented on *Emerson* v. *The Judges of the Supreme Court of Newfoundland*, and cited *In re Stewart* (2); *Ex parte Bayley* (3); *Lechmere Charlton's Case* (4); *Martin's Case* (5).

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Judgment was reserved, and now pronounced by

SIR JAMES W. COLVILE:—

This appeal is brought by Mr. *Thomas Newton*, a Barrister-at-Law and an Advocate of the High Court of Judicature for the

(1) 8 Moore's P. C. Cases, 167.
(2) Law Rep. 2 P. C. 88.
(3) 9 B. & C. 691.
(4) 2 My. & Cr. 342.
(5) 2 Russ. & My. 674, n.

North-Western Provinces, against two Orders of that Court dated respectively the 13th and the 27th of August, 1870.

The particular terms of these Orders will be afterwards considered. It is sufficient for the present to state that they were made in the exercise of the power vested in the Court by the 8th section of the Letters Patent constituting it; and that by the latest of them Mr. *Newton* was suspended from practising as an Advocate of the Court until the further Order of the Court. Liberty was at the same time given to him, at the expiration of five years from the date of the Order, to apply for permission to resume practice, which, on the production of satisfactory proof of good conduct in the meantime (it was said), would be conceded to him. The effect, therefore, of the Order was to suspend Mr. *Newton* from practising as an Advocate of the Court, certainly for five years, and possibly for a longer and indefinite period.

The following are the proceedings which resulted in this suspension:—

On the 19th of July, 1870, Mr. *Bramly*, the officiating Judge of *Allyghur*, forwarded to the High Court a report of the proceedings in his Court on an application made by Mr. *Newton* on behalf of one Mrs. *Saunders* for Letters of administration to the estate of her deceased Son, *Paterson Tandy Saunders*, imputing improper conduct to Mr. *Newton* in that matter, and submitting to the Court whether such conduct was becoming a Barrister. The precise nature of the charges against Mr. *Newton* will appear from the next proceeding.

On the receipt of this communication the High Court passed an Order, dated the 30th of July, 1870, calling upon Mr. *Newton*, on the 10th of August following, to answer the matters stated in Mr. *Bramly's* Letter and report, whereby it had been brought to the notice of the Court that he, *Thomas Newton*, had been guilty of grossly improper conduct in that, whilst acting as Counsel for one Mrs. *Saunders*, on application to Mr. *Bramly* for Letters of administration of the estate of her deceased Son to be granted to her, he, well knowing the said Mrs. *Saunders* not to be the Administratrix of the deceased *Paterson Tandy Saunders'* estate, obtained from the said Mrs. *Saunders*, and indorsed and put in circulation, a Government loan note for the sum of Rs.3,000 belonging to the estate of the said *Paterson Tandy Saunders*, and also certain other Government loan notes the property of the said

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estate, the said Government notes having been indorsed by Mrs. *Saunders* as Administratrix, although the said *Thomas Newton* was well aware that administration of the estate and effects of the said *Paterson Tandy Saunders* had not been granted to the said Mrs. *Saunders;* whereby also it had been brought to the notice of the Court that Mr. *Thomas Newton* had been guilty of grossly improper conduct in the discharge of his professional conduct as an Advocate in having wilfully deceived the said Mr. *Bramly* in the course of the hearing of the said application for Letters of administration, by informing him, on or about the 9th of July, 1870, that he was greatly surprised to hear that the said *Paterson Tandy Saunders* was illegitimate, whereas he, the said *Thomas Newton,* was well aware of the illegitimacy of the said *Paterson Tandy Saunders,* with some circumstances of aggravation concerning this latter charge which it is unnecessary to state.

Mr. *Newton* appeared before the Court under this Order, and made a verbal statement in explanation of both charges; evidence was taken, and a number of Letters were produced in the course of the inquiry. On its termination the Court acquitted Mr. *Newton* of the second charge, but pronounced his explanation in respect of the first to be unsatisfactory, in terms which will be afterwards considered; and, having commented on his conduct in respect of various new matters which had come out in the course of the inquiry, and on the perusal of the Letters produced, determined to take further proceedings against him. The result was that, on the 13th of August, 1870, an Order, being the first of those under appeal, was drawn up in the following terms:—

"In the Matter of *Thomas Newton,* an Advocate of the Court. It appearing to the Court that the above-mentioned *Thomas Newton,* an Advocate thereof, has been guilty of grossly improper conduct in the discharge of his professional duty as an Advocate in procuring his Client, *Catherine Saunders,* to indorse, as 'Administratrix to *Paterson Tandy Saunders*' estate,' three Government promissory notes, of the aggregate value of Rs.14,000, or thereabouts, viz., No. $\frac{000647}{9478}$ of 1854-1855, for Rs.1,000; No. $\frac{002130}{5835}$ of 1856-1857, for Rs.10,000, both bearing interest at 5 per cent., and No. $\frac{001783}{1346}$ of 1859-60, for Rs.3,000, bearing interest at (5½) five and a half per cent., and belonging to the estate of *Paterson Tandy Saunders,* deceased, he, the said *Thomas Newton*

well knowing that the said *Catherine Saunders* was not the Administratrix of such said estate, and in indorsing and putting in circulation one of the said Notes, to wit, the Government promissory note No. $\frac{001785}{13406}$ of 1859-60, for the sum of Rs.3,000, bearing interest at 5½ per cent. And also in drafting a certain Letter, dated on or about the 14th day of April, 1870, and in procuring the same to be copied by one *Maria Hill*, and signed and sent by the said *Catherine Saunders* to the firm of *Gillanders, Arbuthnot, & Co.*, of *Calcutta*, which said Letter contained a statement, or introduction, in the words following, to wit:—'With reference to your kind offer to advance money for the coming Indigo season,' which statement or introduction was known to the said *Thomas Newton* to be false, and inserted with the intention of inducing the said firm of *Gillanders, Arbuthnot, & Co.*, to advance for the manufacture of indigo certain moneys, and with the intention of procuring the said *Catherine Saunders* to pay to him the said *Thomas Newton* out of the moneys if and when so advanced a sum or sums of money on account of his fees as an Advocate, and also in procuring employment as an Advocate, by means of a threat contained in a certain Letter written and sent by the said *Thomas Newton* to the said *Catherine Saunders*, and dated on or about the 27th day of January, 1870, in the words following, to wit:—'If I do not appear for you, I fear the result, as I know all the particulars; and recollect, if the answer is not properly put, you may lose all you have.' And generally in his behaviour and conduct in connection with his employment as an Advocate by the said *Catherine Saunders*, at divers times in the months of January, February, March, April, May, June, and July, 1870. Now, the said *Thomas Newton* is hereby ordered to attend at the sitting of this Court, to be held at the Court House, *Allahabad*, on Saturday, the 27th day of August instant, at eleven of the clock in the forenoon, to shew cause why he, the said *Thomas Newton*, should not be suspended from the practice of his profession as an Advocate of this Court within the jurisdiction of this Court."

Mr. *Newton* duly appeared to shew cause against this rule; and, on the 27th of August, 1870, the Court gave final judgment. It acquitted Mr. *Newton* on all but the two first charges, viz., the imputed misconduct in inducing Mrs. *Saunders* to indorse the Govern-

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ment notes; and the imputed misconduct in causing her to write the Letter to *Gillanders, Arbuthnot, & Co.*; and finding that these two charges had been wholly or in part established against him, passed the Order of suspension, which is the second of those under appeal.

Exception was taken at their Lordships' Bar to this course of procedure. It was argued first, that the Order of the 30th of July, 1870, was objectionable, inasmuch as it prejudged the Appellant's case, by assuming that he "had been guilty of grossly improper conduct." Their Lordships, however, are of opinion that, although this Order may not have been very happily worded, the true construction of it is, that Mr. *Newton* was thereby merely called upon to answer the matters stated in Mr. *Bramly's* Letter and report; such matters being, for the sake of convenience, reduced into the two formal charges of professional misconduct set forth in the Order; and that there was no intention on the part of the Court to prejudge the case, or to prevent Mr. *Newton* from having the full benefit of any explanation of the matters charged, which he might be able to offer. That this was so, is shewn, their Lordships think, by the subsequent proceedings.

It was next objected, that the Judges improperly placed themselves in the anomalous position of being at once Accusers and Judges; and that they ought to have committed the conduct of the proceedings against Mr. *Newton* to some third person. And in support of this latter proposition, the case of *Emerson* v. *The Judges of the Supreme Court of Newfoundland* (1), was cited. In that case, whilst litigation between an Attorney and his former Client was still in some sort pending, though after payment under protest of the sum claimed, the Court, of its own mere motion, and not on the application of the opposite party, and without previously calling upon the Attorney to explain his conduct, served him with a notice to shew cause, within four days, why he should not be struck off the Rolls, and refused to enlarge the rule, and give him further time to prepare his defence; and on his failing to shew cause within the four days, made the rule absolute. It is obvious that several of the circumstances which induced this Committee to reverse that Order, do not exist in the present case. It is, however, undoubtedly true that, in delivering their Lordships' judgment, Lord *Kingsdown*

(1) 8 Moore's P. C. Cases, 157.

said, that an explanation should have been required; and that upon that explanation proving insufficient, "the proper course would have been that some person should have been instructed on behalf of the Crown, to apply to the Court for a rule for this gentleman to shew cause why further proceedings should not be taken" (1).

Looking to the substance of the objection as applicable to this case, their Lordships think that there is a broad distinction between the charges originally brought by Mr. *Bramly*, and those made for the first time by the Order of the 13th of August, 1870.

The High Courts in *India* exercise peculiar powers of superintendence and control over the subordinate Courts, and the proceedings therein. It was, their Lordships apprehend in the regular course of practice that Mr. *Bramly* should make the report which he did make of proceedings in his own Court; and that he should complain, if he had ground of complaint, to the High Court of the supposed *mala praxis* of a Practitioner over whom he had no direct power; but who, by virtue of being an Advocate on the rolls of the High Court, had the right of appearing in the Lower Court; and their Lordships are of opinion, that the High Court was perfectly justified in taking action on that report and complaint, by calling upon Mr. *Newton* to explain his conduct.

Whether it would not have acted more regularly if it had placed the conduct of the further proceedings against Mr. *Newton* in the hands of a third party is another question. But the Judges have stated that they had not the means of doing so, and their Lordships must accept that statement; and they are disposed to think that, even on the authority of the case cited, the omission to do this is not a fatal objection to the subsequent proceedings.

Their Lordships, however, cannot but regret that the learned Judges of the High Court, acting on Letters which came to their knowledge in the course of the first inquiry, should have thought fit, on the instant and without further inquiry, to frame new charges against Mr. *Newton*, and thus assume the functions of Accuser and Judge. A very strong and clear case may arise, in which such a course would be justified. But the inconvenience of it is great; and the more manifest in the present case, inasmuch as the learned Judges found themselves obliged, in all but one instance, to

(1) 8 Moore's P. C. Cases, 167.

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abandon the charges which they themselves had on the first impression suggested and framed.

Their Lordships have deemed it right to make these observations on the questions of form which have been raised before them. To decide, however, such a case as this upon a question of form would be far from satisfactory; and they, therefore, proceed to consider it upon its merits.

They are relieved from the necessity of considering any but the two charges upon which Mr. *Newton* was finally suspended. Of the second of the original charges he was acquitted on the first proceeding against him. Of all but two of the charges embraced in the Order of the 13th of August, 1870, he was also acquitted, the Court being of opinion, that though the conduct imputed to Mr. *Newton* by those charges may have been inconsistent with the rules and traditions which regulate the conduct of Barristers in this Country, and may not have been altogether unobjectionable even in *India;* it did not amount to that *mala praxis* on which the Court, having regard to the position and functions of an Advocate in the *North-West Provinces,* could fairly found any proceeding of a penal character.

Their Lordships propose to deal first with the last of the two charges which the High Court thought were established against Mr. *Newton,* viz., that of having counselled Mrs. *Saunders* to write to Messrs. *Gillanders, Arbuthnot, & Co.,* the Letter of the 14th of April, 1870.

The facts admitted or proved concerning this letter are as follows:—

Mrs. *Saunders* was a native woman who, after cohabiting for several years with Mr. *George Saunders,* an Indigo planter, in the *Allyghur* District, had been married by him some time before his death. The date of this marriage is now ascertained to have been the 17th of October, 1856. Under the Will of her deceased Husband she seems to have been tenant for life of his indigo Factory and other property. She had several children by him, born either before or after the marriage. One of them was a Son, *Paterson Tandy Saunders,* who, under his Father's Will, or otherwise, was possessed of several Government notes aggregating Rs.14,000. Another was a Daughter who had been married first to a person

of the name of *Nichterlein;* and afterwards, after having been sued by him for breach of promise of marriage, to a Mr. *Kelly*. *George Saunders* had been indebted to Mr. *Nichterlein's* estate, which was in the hands of the Administrator-General. Mrs. *Nichterlein*, before her second marriage, had made a gift of her share of this debt to her Mother, or to her Father's estate; but this gift was disputed by her second Husband; and the original debt, and the effect of Mrs. *Nichterlein's* gift, appear to have been, at the beginning of 1870, subjects of pending or contemplated litigation. Mrs. *Saunders* had likewise a cross claim against *Nichterlein's* estate for the proceeds of indigo of a former season.

On the 15th of December, 1869, *Paterson Tandy Saunders* died, under age and unmarried. Shortly after his death, and on the 10th of January, 1870, Mr. *Newton*, who had acted in at least one lawsuit on behalf of Mr. *George Saunders*, and appears to have kept up friendly relations with the family, wrote to Mrs. *Saunders* condoling with her on the death of her Son, and volunteering, if he were not then retained to act for her in that matter, some advice concerning the litigation between her and the Administrator-General.

It further appears, that she was then pressed for money, and that she required funds both for the purposes of the indigo Factory, and for carrying on the suits pending or about to be commenced, and that in respect to the latter Mr. *Newton* was to receive certain fees. In these circumstances she, under the advice of Mr. *Newton*, wrote and sent to Messrs. *Gillanders, Arbuthnot, & Co.*, Merchants of *Calcutta*, the following letter:—"*Coel Factory, Allyghur*, 14th April, 1870. Dear Sirs,—With reference to your kind offer to advance money for the coming Indigo season, I write to inquire, whether you would place at my disposal Rs.30,000. On hearing from you I will commence my Indigo advances."

On the first inquiry, that of July, 1870, it came out on the evidence of Miss *Hills*, the Governess and amanuensis of Mrs. *Saunders*, that if any money had been received from *Gillanders, Arbuthnot, & Co.*, Mr. *Newton's* fees would have been paid.

Messrs. *Gillander, Arbuthnot, & Co.* however, declined to make any advance, and nothing came of the application to them.

The Judges of the High Court, nevertheless, saw fit to make

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this transaction matter of charge against Mr. *Newton*. The view of it which they took when they framed the charge in respect of it, which is contained in the Order of the 13th of August, 1870, was thus stated by the acting Chief Justice:—"Again, you induced an uneducated woman whom you were advising, whether wisely or unwisely matters not, to carry on certain litigation, whereby you hoped to secure to yourself, what I must call, under the circumstances, the exorbitant fee of Rs.3,800, to write to a *Calcutta* Firm a Letter drafted by you, containing a false assertion, whereby that Firm was to be induced to advance to Mrs. *Saunders*, for the purposes of her Indigo Factory, certain moneys, and which moneys that firm would naturally consider was to be employed for the legitimate purposes of the Factory, whereas a large portion was to be paid to you for the purposes of carrying on litigation. It is abundantly clear that *Gillanders, Arbuthnot, & Co.* had never promised to advance moneys to Mrs. *Saunders*. That Lady, from her manner to-day, we cannot doubt had never heard their names before. The Court cannot but come to the conclusion that the statement made in the Letter to *Gillanders, Arbuthnot, & Co.*, as to their previous offer of assistance was, to your knowledge, false, and that it was made for the purpose of obtaining money to pay your fees."

When, however, cause was shewn against the rule, it came out that Mrs. *Saunders*, so far from having never heard the names of Messrs. *Gillanders, Arbuthnot, & Co.*, had been in correspondence with them at various times between the years 1866 and 1870, and had had various business transactions with them. It was further urged, that the assumption that *Gillanders, Arbuthnot, & Co.* had offered to advance money to Mrs. *Saunders* if erroneous, had deceived, and could deceive nobody. And the High Court in its final judgment of the 27th of August, 1870, expressed its willingness to assume "That it was from information given him by Mrs. *Saunders*, that he (Mr. *Newton*) introduced the passage relating to a former offer of advances." The gist, therefore, of the offence imputed to Mr. *Newton* in respect of this transaction is reduced to this, viz., that he, knowing that a portion of the moneys to be received from *Gillanders, Arbuthnot, & Co.* was to be employed in payment of his fees, drafted for his Client a Letter calculated to induce the Firm to believe that this advance

was sought for a different purpose. It appears to their Lordships, after carefully considering all that is said of this matter in the final judgment of the High Court, that the harsh view of the transaction there taken is not borne out by the facts, and that the drafting of the Letter cannot be taken to constitute such grave professional misconduct as would justify any part of the severe sentence passed on Mr. *Newton*. The Letter is an application in the most general terms from an Indigo planter for an advance of money for the coming season. It is clear that Mrs. *Saunders* did want money for the purposes of her Factory. Their Lordships are not aware that such an application implies any undertaking that the money if advanced is to be ear-marked; is not to be mixed with the general funds of the Planter; and that no part of it is to be withdrawn, even temporarily, and applied to a purpose other than the cultivation or manufacture of Indigo. If the lender chooses, he can of course take any security or guarantee he may think necessary, in order to have the money set apart and applied entirely to the purpose of producing the crop on the security of which he makes the advance. But here the loan was declined. All that is established is, that Mrs. *Saunders*, pressed for money to provide both for carrying on her Factory, and for the prosecution of a suit in which she may well have hoped to recover further funds, wrote this Letter under Mr. *Newton's* dictation, meaning to apply part of the money in the first instance to the payment of his fees in the suit. Looking to all that is established in respect of this Letter, and to the absence of any complaint on the part of any person concerning it, their Lordships are of opinion, that the Order against Mr. *Newton* cannot be maintained on this charge.

They next proceed to consider the graver charge against him of having induced or advised his Client to indorse the Government notes as Administratrix of *Paterson Tandy Saunders*, when she was not entitled to assume that character. The facts proved which particularly relate to this transaction are as follows:—

On the 5th of April, 1870, Mrs. *Saunders* wrote to Mr. *Newton* inclosing one of the Notes belonging to the estate of *Paterson Tandy Saunders*, and standing in his name, being a Note for Rs.10,000, and asking him to get the note renewed in her name, and broken up into ten Notes for Rs.1,000 each. On the 9th of

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April, 1870, Mr. *Newton* wrote to Mrs. *Saunders* to the effect that he had spoken to Mr. *Clarke*, the Treasury Officer at *Allyghur*, who had informed him that the Note could not be renewed, nor interest paid upon it, until she had taken out administration to her Son's estate. Thereupon Mr. *Newton* was instructed to make, and did make, as Counsel for Mrs. *Saunders* in Mr. *Bramly's* Court, the application for Letters of administration to the estate of her deceased Son, describing him as a British subject who had died a minor and intestate. The date of this application was the 2nd of May, 1870. On the 6th of May, the day before the usual citations were issued by the Judge, Mr. *Newton*, who had advanced some small sums to Mrs. *Saunders*, received from her the security for Rs.10,000, and two other Government notes standing in *Paterson Tandy Saunder's* name, and part of his estate, all being indorsed by her as Administratrix of that estate. At the same time she executed to him a receipt admitting the loan of Rs.200, and he executed to her a receipt for the Notes; and Miss *Hills*, in her account of the transaction, has deposed as follows: "Mr. *Newton* wrote the indorsements in pencil on the Notes, and told me to write it small on the pencil marks; and I said at the time, 'Mrs. *Saunders* has not got the Administratrixship, how can I write that?' and he said, 'Whatever blame there is will fall on me.' I said nothing more. I then wrote the indorsements. Mrs. *Saunders* signed them."

The indorsements were special to Mr. *Newton*. One of these notes, being one for Rs.3,000, he afterwards specially indorsed to the *Delhi* Bank, and that Bank having demanded in *Calcutta* a renewal of it, inquiry was made concerning the fact of the grant of administration to Mrs. *Saunders*, and so the transaction was brought to the notice of Mr. *Bramly*.

In the meantime a question had arisen in Mr. *Bramly's* Court touching the legitimacy of *Paterson Tandy Saunders*, and whether administration of his estate ought to be granted to Mrs. *Saunders* as his Mother and next of kin, or to the Administrator-General as representing the Crown. It appears to be now certain that *Paterson Tandy Saunders* was born out of wedlock; but it is suggested on behalf of Mr. *Newton* that he might, nevertheless, as the Son of a Scotchman retaining his domicil though resident in *India*, have been made legitimate *per subsequens matrimonium*.

Their Lordships think that it is fortunate for Mr. *Newton* that the determination of this case does not depend upon this point. If it appeared that Mr. *Newton*, knowing that *Paterson Tandy Saunders* was born out of wedlock, had applied for Letters of administration as if the deceased had been born in wedlock, and pending that application had caused Mrs. *Saunders* to indorse these Bills in the character of Administratrix when she did not possess that character, and had attempted to raise money on them for Mrs. *Saunders*, in the expectation that he might ultimately succeed in showing that the *status* of *Paterson Tandy Saunders* was to be regulated by Scotch law, and that under that law, though born out of wedlock, he was legitimate, their Lordships are of opinion, that his conduct would have been almost without excuse. For the proof of legitimacy, and of the right of Mrs. *Saunders* to administration, and to a beneficial interest in any part of her Son's estate, would in that case have depended on the determination of a disputable, and possibly, very nice question, viz. :—Whether Mr. *George Saunders*, if his domicil of origin were Scotch, had not lost that domicil, and acquired an Indian domicil by settling as an Indigo planter in *India* and there dying. In the cases of *Campbell* v. *Campbell* (1), and *Munro* v. *Munro* (2), one of the principal issues was, whether the Father of the person whose legitimacy was in question had retained his Scotch domicil. And in both cases the facts on which the issue was determined were very different from those on which the like issue would have been tried in the case of Mr. *Saunders*.

But, in truth, this was not the defence of Mr. *Newton* in the High Court, nor need it be his defence here. The case which he made there was that when he first made the application for Letters of administration, and when he caused Mrs. *Saunders* to indorse the Notes, he did not know or believe that *Paterson Tandy Saunders* was born out of wedlock ; and, therefore, had good reason to believe that in a few days she would possess the character which the indorsement attributed to her. And this fact has been found in his favour by the High Court. On the occasion of the first hearing the acting Chief Justice says :—" When you procured your Client to sign the promissory Notes as Administratrix, you

(1) Law Rep. 1 H. L., Sc. 182. (2) 7 Cl. & F. 842.

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doubtless were under the belief that she would at once get administration granted to her, and we, therefore, do not regard the act as so gravely criminal as it would otherwise have been. The opinion which we have formed on the second charge, which is made against you in the Judge's report, that you possibly were not aware that any impediment existed to the obtaining of the administration by your Client, enables us to assume in your favour that when you procured your Client's signature as Administratrix, you believed that in a very short time she would be in a position legally to assume that character and make a good title to her Son's property."

If the High Court had found upon sufficient evidence that Mr. *Newton* had advised Mrs. *Saunders* to make the indorsements as Administratrix, knowing that she had no title, or a doubtful title, to obtain the grant of Letters of administration, their Lordships would have felt that the sentence upon Mr. *Newton* ought to be confirmed. But the finding of the High Court negatives this knowledge; and upon this finding of the High Court, their Lordships feel that, although in this matter Mr. *Newton* has been guilty of a grave irregularity, which, in their opinion, is well deserving of censure, he has been acquitted of having acted with the *malus animus* which is a necessary ingredient in every fraudulent act, and, therefore, that his conduct, though censurable, does not bear the character which the heavy sentence passed upon him would stamp upon it. Their Lordships, therefore, however unwilling to weaken the hands of the Courts of *India* in repressing professional misconduct and maintaining a high standard of honour amongst those who are admitted to practise before them, have come to the conclusion that in this case it is their duty humbly to advise Her Majesty to allow the appeal, and to reverse the last of the Orders against which it is brought, and in lieu thereof to order that the rule to shew cause of the 13th of August, 1870, be discharged. They do not propose to recommend the reversal of that Order, inasmuch as such reversal would imply that no rule to shew cause ought to have been made. They make no order or recommendation as to costs.

Solicitor for the Appellant: *Oehme.*

Solicitors for the Respondents, the Judges: *West & King.*

WALTER WARDLE . . . . . APPELLANT; J. C.*

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THE VERY REVEREND JOHN BETHUNE, *ès qualité* . . . . . RESPONDENT. *Nov.* 17, 18, 20.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Law of Lower Canada—Vices du sol—Art. 1688 *of Civil Code of Lower Canada —Liability of Builder, acting under Employer's Architect, for defective foundations made by preceding Builder.*

Article 1688 of the Civil Code of *Lower Canada* enacts that, "If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the Architect superintending the work and the Builder are jointly and severally liable for the loss." Such Article held to be declaratory of the law of *Lower Canada*, as it existed before the promulgation of the Code.

A Builder, before the passing of the Code, contracted to execute, in a workmanlike manner, all the work requisite to be done in building and completing *Christ Church Cathedral*, in *Lower Canada*, according to the plans and drawings made by an Architect, upon foundations already made and completed by a previous Builder, under the direction of his Employer's Architect, the expense of which foundations the contract stipulated should be estimated and allowed for. The Builder erected the Cathedral in strict conformity with the contract, under the direction of the Architect, and in a workmanlike manner; but the Tower of the Cathedral, shortly after it was erected, and before the works were completed, sunk, and considerable damage was done. The cause of the sinking was found to be the insufficiency of the foundations, as planned by the original Architect, and constructed by the former Builder. This defect, though not patent, might have been discovered by the Builder of the Cathedral, before making the contract:—*Held* (affirming the judgment of the Court of Queen's Bench in *Lower Canada*), in an action by the Builder against his Employer (the Employer claiming to deduct from the contract price agreed to be paid to the Builder, the amount of his charges for repairing the damages caused to the building by the sinking of the Tower, through the insufficiency of the foundations) that the Employer was entitled to make the deduction, as the Builder was responsible for the defect in the foundations, and was not freed from liability, either by acting under the directions of his Employer's Architect, or by reason of the defective foundations being the work of the preceding Builder.

The decision in the case of *Brown* v. *Laurie* (1) adopted.

THIS was an action in which the Appellant, a Builder, was the Plaintiff, and the Respondent, the Defendant.

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., SIR JOHN STUART, and SIR MONTAGUE EDWARD SMITH.

(1) 1 Low Can. Rep. 343; 5 Low Can. Rep. 65.

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The declaration alleged, in substance, that a contract, dated the 15th of August, 1857, was entered into between the Plaintiff and the Defendant, whereby the Plaintiff agreed to execute, in a workmanlike manner, all the work requisite to be done in building and completing the *Christ Church Cathedral*, about to be erected on a piece of ground situate as therein described, according to certain plans made by *Thomas S. Scott*, Architect, and in strict conformity with the specifications forming part of the contract, and with such descriptions and details as should be furnished to the Plaintiff by the Defendant's Architect during the progress of the works. That by such contract the Plaintiff agreed to provide, at his own cost, all materials required for the works, save and except *Caen* stone, which was agreed to be furnished to the Plaintiff by the Defendant, as set forth in the specifications, at a certain price. That by such contract the various portions of the works were to be finished at times stated, the whole work to be finished by the 1st of August, 1859, for the price of £30,100 currency, payable monthly, on the certificate of the Architect. The declaration then alleged the completion of the contract works to the satisfaction of the Architect, who certified the same, and that the Plaintiff had been delayed in execution of the work, for want of *Caen* stone, and by reason of divers other works which he had performed for the Defendant on the Cathedral, according to accounts filed and certified by the Architect, to the extent of £2,500. The declaration contained special counts for work and labour done in and about the Cathedral at the Defendant's request, by order of the Architect in charge, to cover all extra work, repairs, materials, and other works, not strictly contract works, and the changes, alterations and deviations from the plans under the directions and written orders of the Architect, and which were certified for. Then followed counts for moneys laid out for the Defendant, and the Plaintiff claimed the sum of £5,000 currency.

The Respondent filed three pleas. The first plea (after alleging that the work was defective, and, in certain particulars, not well done according to the specifications), contained the following allegation as to the insufficient foundations of the Tower :—"That the foundations of the building, and specially of the Tower thereof, were and are made to bear a weight of not less than eight tons to

each superficial foot, whereas the area of such foundations ought, according to all well-acknowledged rules in the art of building, to have been so extended as not to allow of more than two tons to be sustained on each superficial foot of area;" and "that in consequence of the want of care, attention, and skill, on the part of the Plaintiff, and the defective, and unskilful, and unworkmanlike manner in which the Building, Tower, and Spire, were constructed by the Plaintiff, the Tower and Spire, shortly after their erection, sunk to a considerable extent and went off the plumb, in consequence whereof the piers, arches, and various other portions of the said building were crushed, the abutments of the arches made to expand, and push the walls of the building out of place, and out of the plumb," &c. The plea then stated the admitted portions of the account, and set up payments and deductions, alleging the amount of repairs caused by the sinking of the Tower to amount to $2,902·15, and that it would cost a larger sum to take the Tower down to the foundations and make the necessary repairs —viz., $30,000.

The second plea set up the same facts, and claimed compensation by way of damages to a greater amount than the sum admitted by the plea to be due. And the Defendant prayed that the apparent balance due to the Plaintiff might be set off against, and be declared compensated and extinguished by, the sum of $30,000, as estimated for cost of repair. The third plea raised the general issue.

To these pleas the Plaintiff by his special answers, in substance, stated; that all work done by him was well done; that the allegation in the Defendant's plea as to the weight per superficial foot sustained by the foundation, might or might not be true; that the Plaintiff had nothing to do with making the calculations for or with the building of the foundation, and was not liable for the same; and that the repairs specified were done under the authority of the Building Committee by their order and resolution, of which Committee the Defendant was a member.

To these special answers, the Defendant by special rejoinder, in effect, set up; that the consent of the Committee to the repairs being charged as extra work, was given on the representations of the Plaintiff that they would not exceed £80 or £90.

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The facts of the case, as disclosed by the evidence, were as follows:—

In January, 1857, the parish Church having been destroyed by fire in 1856, a Finance and Building Committee, of which Respondent, the Rector and Dean of *Montreal*, was a member, was appointed under the Colonial Act, 14 & 15 Vict. c. 176, to undertake the erection of a new parish Church and Cathedral for the City of *Montreal*. In February, 1857, Mr. *Wills*, of *New York*, was instructed by the Committee to prepare certain plans for the erection of the Cathedral and the execution of the works, inclusive of the foundations and works relating thereto. In March, 1857, Messrs. *Brown & Watson*, Contractors, were employed by the Committee to dig trial pits on the site of the proposed Cathedral, for the purpose of testing the character and fitness of the soil, and their charges for so doing were certified by the Architect and paid by the Committee. Mr. *Wills*, the Architect, died, and the Committee then appointed in his place Mr. *T. S. Scott*, of *Montreal*, whom they required to follow the plans of Mr. *Wills*, and to prepare any other plans that might become necessary. Messrs. *Brown & Watson* tendered for building the foundations of the Cathedral, and their tenders having been accepted, they entered into a contract with the Respondent, by which they agreed to execute, in a good and workmanlike manner, and of the best materials, according to the plans of *Wills*, and in conformity with the specifications annexed to the contract, and with such descriptions and details as might be furnished to them during the progress of the works, the whole and every part of the excavators' and masons' work required to be done, and requisite and necessary to be done, in erecting and building the foundation walls of the Cathedral.

A subsequent tender of the same Builders was accepted on the 18th of May, 1857, by which they agreed to build the walls of the Cathedral to a height of 2 feet 6 inches above the height previously provided for. Both these contracts were carried out and completed by the middle of July in the same year.

The Committee, desiring to proceed with the erection of the Cathedral, advertised for tenders for the erection of *Christ Church Cathedral*, and announced that plans and specifications could be seen at Mr. *Scott's* offices. The specifications provided, *inter alia*,

that "the whole work executed on area floor (meaning the foundations) must be taken as it stands, and allowed for."

On the 29th of July, 1857, the Appellant tendered, undertaking to provide necessary labour and materials and build the Cathedral according to the drawings and specification supplied by Mr. *Scott*, for the sum of £30,100, which amount included a sum of £1,750 as the value of work already done by Messrs. *Brown & Watson* in the foundations. The sum of £1,750 the Appellant allowed out of the £30,100; his tender was, therefore, really £28,350, and was limited, as he alleged, to the work of the superstructure, and the balance claimed in his action was not due on any work which included the foundations. The tender of the Appellant was accepted by the Committee. On the 15th of August, 1857, the contract, the subject of the action, between the Appellant and the Respondent was entered into, by which the Appellant agreed to "execute and perform, in a good, neat, proper, substantial and workmanlike manner, and of the best and most approved materials of their several kinds, the whole and every part of the works required to be done and requisite and necessary to be done in erecting, building, and completing the *Christ Church Cathedral*" according to "the plans or drawings thereof numbered respectively from number 1 to 35 inclusive, made by *T. S. Scott*, Esq., Architect, and in strict conformity with the specifications thereunto annexed, and forming part and parcel of that present contract," "and also in conformity with such descriptions and details as might be furnished to the said Contractor during the progress of the works by the Architect," &c.

The Appellant proceeded with the works, and during the progress thereof, viz., in the autumn of 1858, the Tower of the Cathedral (the Cathedral being cruciform, the Tower in the centre) began to subside, and it gradually sank or settled, from time to time, to the extent, in the whole, of five inches, causing damage to the building, extra labour, &c., and delay in the completion of the contract. The sinking or settlement was immediately brought by the Appellant to the knowledge of the Architect and the Committee, and the Appellant disclaimed any liability, and ultimately, in August, 1859, the Committee passed a resolution that the Appellant should be authorized to repair the damage caused by the

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sinking of the Tower, and to charge for the same as extra work. The sinking of the Tower was not, as the Appellant contended, in any respect owing to want of care or skill in any of the work executed by him, but resulted entirely from the erroneous calculations and unskilful planning or design of the Architect, Mr. *Wills*, in not allowing for the Tower and the weight thereof a sufficient area of foundation, having regard to the character of the soil upon which it was to be erected. The Appellant had no knowledge of and took no part in the testing of the soil, or in the designing or planning or building of the foundations. It was provided by the contract that the amount to be paid the Appellant for extras or additional work should be certified by the Architect, Mr. *Scott*, and that such certificate should be final and conclusive between the parties.

The Appellant having finished the work under his contract, and the extra work ordered during the progress of the Cathedral, the Architect, Mr. *Scott*, certified on the 5th of September, 1860, that, with the exception of the condition of the building arising from the sinking of the Tower and quality of the *Caen* stone, the liability as to which latter item he left to the Committee, the Appellant had "completed his portion of contract for the erection of the above building according to plans and specifications drawn out by the late *Frank Wills*, and himself." He certified likewise the amount due to the Appellant for extras.

A further matter in dispute between the Appellant and the Respondent related to the *Caen* stone used in the building of the Cathedral. The specification incorporated in the contract between the Appellant and the Respondent on the 15th of August, 1857, provided that the Respondent should supply to the Appellant the *Caen* stone required for the works at 3*s.* 9*d.* per cubic foot, measured in the block on the ground. The *Caen* stone was supplied by the Respondent in blocks accordingly to the Appellant, and, as appeared by the evidence, was of bad quality, and unavoidably caused extra waste in cutting, rendering necessary much extra labour upon such stone, and causing, as alleged, considerable delay in the execution of the contract and consequent loss to Appellant.

Another matter in dispute was raised as to the repairs rendered

necessary by the injury to the Cathedral caused by the sinking of the Tower and the bad quality of stone. The Appellant insisted, first, that he was under no obligation to do those repairs; and, secondly, that he had executed them (without, however, charging any profit upon them) under the orders, and with the sanction of the Committee and Architect; the Committee having, by a Resolution, dated the 24th of August, 1859, authorized the repairs to be done by the Appellant, and to be "considered as extra work and charged for accordingly." The Respondent insisted, first, that the Appellant was legally bound to do the repairs at his own cost; and, secondly, that the resolution was given on a "representation" of the Appellant, communicated to the Committee by the Architect, that the cost of the repairs would not exceed £80 or £90.

The Appellant insisted that he never made or authorized any such representation, which, as appeared by the evidence, was but an approximate estimate of the Architect, verbally submitted by him in conversation with the Committee, and without communication with or knowledge of the Appellant, and it was objected before the Court below that the authority must be collected from the resolution itself, and could not be qualified by parol evidence.

The repairs so done by the Appellant, amounting to about £750, were, as the Appellant insisted, substantially undertaken and done after and in reliance upon the resolution of the Committee, and were included in the work certified by the Architect; and under the terms of the contract the Architect's certificate for value of additions to the work under the contract itself was conclusive.

A further question between the parties arose from a claim of £368. 2*s.* 6*d.* made by the Respondent against the Appellant, and allowed by the Court as and for premiums for fire insurance paid by Respondent.

The provision in the specification as to insurance was that "the Architect to have power to insure the Church for the same amount or sum that has been advanced to the Contractor, and retain any moneys so laid out from the next or any subsequent payment;" and a large portion of these premiums, amounting to £188 15*s.*, was for extra risk, called workman's premium on Carpenter's work, not being the Appellant's work, in and about the building.

The Superior Court at *Montreal* (Mr. Justice *Monk* presiding),

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gave judgment, on the 24th of February 1862, dismissing the Plaintiff's claim for damages occasioned by the bad quality of the *Caen* stone and for delays caused by sinking of the Tower, &c., and held that the Appellant was responsible for the damage occasioned by the sinking of the Tower, and that the only sum which the Appellant had established as due to him under the contract for extra work was $3,267·86, from which the Defendant was entitled to deduct $1,472·50 for premiums of insurance, leaving a balance of $1,795·36 due to the Plaintiff, against which the Defendant was entitled to set up in compensation the damage complained of; and considering the evidence as to such damage unsatisfactory, the Court ordered "that by Experts to be named in due course of law, further evidence should be taken and produced before the Court to ascertain and determine how much it would cost to repair the damage to the said building caused by the sinking of the Tower, and to place the Cathedral Church and its Tower, and Spire, in the state and condition in which they ought to be under the contract and specifications filed in the action, in addition to what the Defendant had already expended in repairing three of the buttresses of the Tower, and to make their return as should thereafter be determined by a future Order of the Court."

From this judgment the Appellant appealed to the Court of Queen's Bench of *Lower Canada*, which Court, on the 4th of June, 1864, consisting of *Duval*, C.J., *Meredith*, *Mondelet*, and *Badgley*, JJ., (*Meredith*, J., dissenting), affirmed the above judgment, and allowed $400 additional as the limited amount which, in the opinion of the Court, the Committee had consented to pay for extra works caused by the sinking of the Tower, on the "representations of the Appellant and the Architect employed" that the repairs would not exceed that sum, which allowance increased the above-mentioned balance of $1,795·36 to the sum of $2,195·36.

In pursuance of the Order of the Court of the 24th of February, 1862, Experts were appointed, who made a report (afterwards set aside for irregularity) of the amount incurred to repair the damage to the building, and ultimately, on the 21st of February, 1857, other Experts having been appointed, the final report of Experts of the cost of repair was made and homologated by the Court estimating the cost at an amount much in excess of the apparent

balance of $2,195·36 found due to the Appellant, viz., $29,875 (or about £7,500) plus £232. 8*s.* 9*d.*, already expended by the Respondent in repairing three buttresses of the Tower.

Afterwards, on the 17th of April, 1867, the Superior Court, Mr. Justice *Berthelot* presiding, gave judgment, holding the allowance of $2,195·36 compensated and extinguished by the estimated damage of $29,875, and dismissing the Plaintiff's action with costs.

From this judgment the Appellant appealed, on the merits, to the Court of Queen's Bench with a view of raising the whole case before the Court, and on the 9th of December, 1868, that Court, consisting of *Duval*, C.J., *Caron*, *Badgley*, and *Drummond*, JJ. (Mr. Justice *Caron* dissenting) confirmed the judgment of the Superior Court.

From this judgment, and upon the merits of the whole case, the appeal was brought

Mr. *Horace Lloyd*, Q.C., and Mr. *J. Morgan Howard*, for the Appellant:—

The questions raised by this appeal involve the legal effect, by the law of *Lower Canada*, of a building contract entered into by the Appellant and the Respondent. The two material points are: first, is the Builder, acting under the orders of the Architect chosen by his Employer, under such a contract as was entered into here, liable? And, secondly, supposing him to be so, is he liable for the defect in the foundations made by a former Builder?—the works contracted for have been performed, and, with the extras occasioned by the sinking of the Tower, certified and approved by the Architect. The contract must be construed by the law of *Lower Canada*, and though the Code Civil of *Lower Canada* was passed and promulgated since the date of the contract, and would not, therefore, be the rule of construction, yet as the enactments in the *Lower Canada* Code regarding building contracts are, in fact, similar to those of the Code Civil of *France*, which is founded on the Roman Law, *Codex*, *Lib.* VIII., tit. xii., No. 8; *Domat*, Civil Law, B. I., *tit.* 4, ss. 8, 9, the law under that Code is applicable to the present case. Art. 1688 of the Code Civil is declaratory of the existing law of *Lower Canada*, it enacts that, "If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavourable nature

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of the ground, the Architect superintending the work, and the Builder are jointly and severally liable for the loss." This enactment is nearly identical with Art. 1792 of the *Code Napoléon*, and its effect and interpretation will be found very fully treated of in the notes to that Article by *Sirey's* Comm. on the *Code Napoléon*, Art. 2270, *Tom.* I., p. 845. Our contention is, that as the foundations were not contracted for or executed by the Appellant, he is not liable in respect of any fault or defect in their execution, nor for any defect in the condition of the soil upon which they were built. By the French law the contract binds us to put the building on the foundations as it stood, and, therefore, if—as it turned out—the foundations were faulty, the Appellant was not liable: *Pinart et Aubry* v. *Thierry, Cour Royale de Paris*, 1845, *Jour. du Palais*, Pt. I., p. 139; *Oache* v. *Roussille; Sirey, Recueil Général* for 1864, Pt. II., p. 153; *Bulla* v. *Firino, Le Droit*, 26th of February, 1870; *Boileux, Comm. sur le Code Civil, Tom.* VI., p. 187–189; *Lépage, Lois des Bâtiments, Tom.* II., pp. 30, 40; except where the plans have specific defects: *Ville de Dijon* v. *Héritiers Montfeu, Cour Royale de Dijon*, 10th of January, 1816. In this case the plans and drawings of the Cathedral were not made by the Appellant, but by an Architect employed by the Respondent; the Architect, not the Appellant, therefore, is liable for the defect: *Fremy-Ligneville, Législ. des Bâtiments*, Nos. 91–92; *Pothier, tit.* "*Louage*," Pt. VII., c. 2, s. 2. The passage in *Pothier* is expressly referred to by the Codification Commissioners in their fourth report, p. 99, upon which Art. 1688 of the *Lower Canada Code* is founded. The case of *Pinart et Aubry* v. *Thierry*, in the *Cour Royale de Paris*, 11th of January, 1845, *Jour. du Palais*, Pt. I. p. 139, is in point. There *Aubry*, the Proprietor, brought an action against the Architect four years after the works were finished. It appeared by the *expertise* ordered, that the sinking or giving way (*affaissement*) of the timber arose from the *mauvaise disposition des plans de Charpente*, and *Thierry*, the Contractor, was brought into the suit by the Proprietor, who demanded a joint and several condemnation against him and the Architect. The Contractor pleaded that he had exactly conformed to the plans of the Architect, *Pinart*. The judgment held the Architect responsible, notwithstanding his offer to prove that the Proprietor had interfered;

Harang v. *Taxile, Paris*, 17th of November, 1849; *Dalloz, Recueil Général* for 1850, Pt. II., p. 206; *Gruiel* v. *Leclerc, Conseil d'Etat, Sirey, Recueil Général* for 1857, Pt. I. p. 779, 5th of February, 1857; *Angros* v. *Joanne, Dalloz, Recueil Général*, 1848, Pt. II. p. 65; *Lambert's Case*, decided by the Parliament of *Aix*, 24th of May, 1740; *Nouv. Denizart, Tom.* III., pp. 312–314. We maintain, therefore, that the whole of the work done by the Appellant being the subject of a written contract, executed in strict accordance with such contract, and duly certified by the Architect, the Contractor, the Appellant, is exempt from all liability in respect of the defective foundations, and that he cannot be made answerable, either alone, or jointly with the Architect, for such defects. The case of *Brown* v. *Laurie* (1), decided in the Superior Court at *Montreal*, and on appeal heard in *banc*, was referred to by the Court below, and will, no doubt, be relied on by the Respondent. It is, however, sufficient to say that that case was not appealed to this Tribunal, and has only the authority, if any, of the Courts in *Canada*, and is open to review; it is also observable that in that case the liability for the *vices du sol* was clearly raised by the pleadings, which it was not in the present case. With regard to the claim in respect of the *Caen* stone, and defects in that supplied by the Respondent to the Appellant, the Appellant never agreed that the stone upon the ground at the time of his tender should be taken as a sample of that to be subsequently delivered to him; and he could not be held liable for any damage occasioned by the badness of the stone he was compelled to use. We maintain, that the injury to the Cathedral not being caused by the Appellant, but resulting from the soil, planning, foundations, or bad quality of stone, for which he was not responsible, he was entitled to be paid his claim for repairs rendered necessary by such defect, done by him under the authority of the Respondent; and that he was entitled to compensation for loss on account of the damage occasioned by the defective nature of the foundations.

Sir *R. Palmer*, Q.C., and Mr. *H. Bompas*, for the Respondent:—

By the Canadian Law, a Builder is responsible for all defects in

(1) 1 Low. Can. Rep. 343; 5 Low. Can. Rep. 65.

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the foundations and mode of construction of the buildings erected by him. This liability is not removed by the fact of his acting under the orders of an Architect of his Employers and following his plans. His liability extends to the building on insufficient foundations, though made by another Builder: *Brown* v. *Laurie* (1); *Macdonald* v. *David* (2); *Wardle* v. *Bethune* (3). These cases are the rule for the construction of Art. 1688 of the Civil Code of *Lower Canada*. That Article is not identical with Art. 1792 of the Code Civil, though founded on it. By the Code Civil the building must be "*construit à prix fait*," and the Builder and Architect are not made "jointly and severally" liable, as by the *Lower Canada* Code; and the authorities which seem in favour of the Appellant are to be explained by their not being contracts at a fixed price, and, therefore, not within the Art. 1792 of the Code, but are left to the general law, as was the case of *Oache* v. *Rousille, Sirey, Recueil Général*, 1864: cited by the Appellant. The case of *Pinart et Aubry* v. *Thierry* was not heard in the *Cour de Cassation*, and, therefore, not of the highest authority. Against the authorities cited for the Appellant upon the present French law, the following authorities are to be set, and, we submit, they clearly turn the scale: *Pochon* v. *Bourg Achard, Dalloz, Recueil Général*, 1835, Pt. I., p. 131. *Troplong's* Comm. on the Code, Art. 1792, *Tom.* II., p. 993, shews that the Builder's responsibility is not removed even by giving notice to the employer of the danger, and that he must not comply with his employer's request; *Michel et Piedevache* v. *Ville de Rennes, Dalloz, Recueil Général* for 1839, Pt. I., p. 105, a decision of the *Cour de Cassation*, affirming that of the *Cour Royale*, and shewing that the Builder is responsible, though he be under the absolute control of an Architect; so also *Grivot* v. *Beaufils, Dalloz, Recueil Général* for 1842, Pt. II., p. 56; and *Lucas* v. *Bigot, Dalloz, Recueil Général* for 1868, Pt. II., p. 160. It has been even said that the Builder cannot, by so stipulating in his contract, relieve himselfof his responsibility: *Troplong, Tom.* II., p. 993. The French law before the *Code Napoléon* is, if possible, still more strongly against the Appellant: *Bourjon, Coutume de*

(1) 1 Low. Can. Rep. 343; 5 Low. Can. Rep. 65.

(2) 1 Low. Can. Rep. 36.

(3) 8 Low. Can. Jur. 289.

Paris, Liv. VI., tit. 2, ch. 9, note 8; *Ferrier, Grand Coutume de Paris, Tom.* I., p. 684, No. 19, tit. "*Prescription,*" Art. 113; *Denisart* (anno 1771) *Tom.* I., *verbo* "*Bâtiments,*" Arts. 10, 11, 12; the latter making it clear, that the Builder was not relieved by following plans and designs; as is also clear from *Nouv. Denisart, Tom.* III., p. 314; and *Merlin, Répertoire, verbo* "*Bâtiments,*" ss. 6 and 7. This last authority expressly says, that the Builder is liable for the failure of the foundations, and *Troplong,* commenting on Art. 1792 of the *Code Napoléon,* is to the same effect. In the passage cited by the Appellant's Counsel from *Pothier,* he is not dealing specially with building contracts. In *Lambert's Case, Nov. Denisart, Tom.* III., p. 113, relied upon by the Appellant, a guaranty is recognised of a wider kind on the part of the Builder than mere responsibility for his own department of work. In *Brown* v. *Laurie* (1) it was held that the Builder is responsible for the *vices du sol,* although he be bound by his contract to follow certain plans and specifications under the direction of an Architect employed by the proprietor. That case is on all fours with this case, and virtually decides this appeal. All the authorities, both on the old French law, as well as the decisions on the *Code Civil,* are collected and commented on in the two several reports of that case, and it is certainly no objection that it was not appealed to this Court. The last decision of the case in 1854 was by the Court in *Banc,* on appeal from the Superior Court at *Montreal.* If the obligation to answer for the foundations is a necessary part of the obligation to warrant the stability of the building, how can a distinction be made between a Builder building on his own foundation, and a Builder building on the foundation made by another Builder? And if a Builder is not relieved by following the directions of the Architect, how can he be relieved by the fact that the foundations were already laid from the duty of examining them, or even by the fact, if that was the fact here, that the Respondent was satisfied with the foundations. The Codification Commissioners for *Lower Canada* refer in their fourth Report, p. 99, art. 76, in their original draft of Art. 1688 of the Code, to *Domat, Bourjon,* and *Brown* v. *Laurie,* and that reference shews that *Brown* v. *Laurie* was considered good

(1) 1 Low. Can. Rep. 343, and 5 Low. Can. Rep. 65.

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law. The element of public policy is not to be lost sight of. The building contracted for has never been accepted by the Respondent, so as to entitle the Appellant under the terms of the contract to payment of the balance that may be due to him.

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Jan. 30.

Their Lordships reserved judgment, which was now pronounced by

SIR JOSEPH NAPIER:—

This was an appeal from the judgment of the Court of Queen's Bench of *Lower Canada* at *Montreal*, in an action that arose out of a contract for building the new Cathedral church of that city.

A Finance and Building Committee, of which the Respondent was a member, having been duly appointed, the late Mr. *Wills*, of *New York*, an Architect, was instructed by them in February, 1857, to prepare plans and drawings for the erection of the Cathedral and the execution of the works thereof, inclusive of the foundations and works thereto relating. These plans having been prepared and approved, Messrs. *Brown & Watson*, Builders, of *Montreal*, were employed to dig trial pits in the site selected for the proposed Cathedral, for the purpose of testing the character and fitness of the soil. The charges for this work were certified by Mr. *Wills*, and paid by the Committee.

Mr. *Wills* having died, Mr. *Thomas S. Scott*, of *Montreal*, on the 29th of April, 1857, was appointed by the Committee as their Architect, on the understanding that the plans and designs of Mr. *Wills* were to be strictly followed and adhered to, and that all other necessary plans were to be made and properly prepared by Mr. *Scott* himself.

Messrs. *Brown & Watson* having made a tender, which was accepted, for the execution of the work of the foundation, a formal agreement was entered into and duly executed on the 7th of July, 1856, by *Brown & Watson*, and also by the Respondent. It was agreed that the work was to be done according to the plans or drawings thereof made by Mr. *Wills*, and in strict conformity with the specifications thereunto annexed and made part of the contract.

The document containing these was headed, "Specifications of Excavators' and Masons' work required to be done, and materials

furnished, for the foundation walls of *Christ Church Cathedral, Montreal,* according to plans prepared by the late *Frank Wills,* Architect." It was signed by *Thomas S. Scott,* Architect, and bears date in May, 1857.

The work so undertaken was completed by *Brown & Watson,* in accordance with their contract, and was delivered up to the Committee, who accepted and paid for it. The Committee next proceeded to advertise for tenders, "for the erection of the Cathedral," and announced that plans and specifications could be seen at Mr. *Scott's* office. It was set forth in one of these—"The whole work executed on area floor to be taken as it stands allowed for."

The tender sent in by the Appellant was as follows:—

"I will undertake to provide all labour and materials required, and build *Christ Church Cathedral* according to the drawings and specification supplied by your Architect (Mr. *Scott*) for £30,600. The above amount includes work already done in foundations, which I value at £1750. Also for filling up and making good ground round building to the level given, and levelling ground in basement story as described, estimated at £250. The waste in converting *Caen* stone, I calculate at 1-7th, or 14½ per cent.

(Signed) "*W. Wardle.*"

This tender was dated the 29th of July, 1857, and was accepted on the 5th of August, subject to certain modifications; and, on the 15th of August, 1857, the final contract for the building of the Cathedral was duly executed by the Appellant and the Respondent. The former undertook to execute in a proper, substantial, and workmanlike manner, and of the best and most approved materials of their several kinds, "the whole and every part of the works required to be done, and requisite and necessary to be done, in erecting, building, and completing the *Christ Church Cathedral* to be erected on a lot of ground situate and being at the corner of *St. Catherine Street, Union Avenue,* and *University Street,* in the said City of *Montreal,* according to the plans or drawings thereof, numbered respectively from number 1 to 35 inclusive, made by *Thomas S. Scott,* Esq., Architect, and in strict conformity with the specifications thereunto annexed, and forming part and parcel of the present contract, and also in conformity with such descriptions

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and details, as may be furnished to the said Contractor during the progress of the works by the Architect."

The next clause in the contract provided that the works thereby undertaken should be commenced, prosecuted, and completed under the superintendence of *Thomas S. Scott*, and to his entire approval. It was also provided that, from the commencement of the said works until their final completion, delivery, and acceptance, the care of the same, and whatever appertained or belonged thereto, should be with the said Contractor; and the said party of the second part should not be accountable for any part of the said works, or any materials or anything connected therewith, which might happen to be lost, stolen, burnt, damaged, or destroyed in any manner howsoever. And in case of the like occurring during the progress of, or before the final completion, delivery, and acceptance of the said works, the said Contractor should, and he did thereby engage to repair and replace such part of the said works as might happen to be lost, stolen, burnt, damaged, or destroyed, at his own expense and costs, and to the entire exoneration of the said party of the second part (the Respondent). It was further agreed that the Contractor should, at his own cost and charges, provide all materials required, save and except the *Caen* stone, which was to be furnished by the Respondents, as set forth in the specifications.

After some other provisions, to which it is not necessary to refer more particularly, there was the following clause:—"The present contract and agreement is thus made and entered into for and in consideration of the price or sum of £30,100, &c., which sum the said party of the second part doth hereby promise, bind, and oblige himself, &c., to well and truly pay to the said *Walter Wardle*."

This included the amount of the Appellant's estimate of the value of the work of the foundation that had been executed by *Brown & Watson*.

The Appellant proceeded to execute the works in strict conformity with the plans and specifications, and in a workmanlike manner; but the Tower of the Cathedral, shortly after it was erected, and before the works under the Contract were completed, began to sink, and it gradually subsided and sank down to the depth of several inches, causing serious injury to other parts of the building, and also causing extra expense and delay in the comple-

tion of the Contract. The cause of this sinking, and of the damage consequent thereon, was ascertained to have arisen from the nature of the soil and the insufficiency of the foundation as it had been planned by Mr. *Wills* and constructed by *Brown & Watson*.

In this state of things disputes arose between the Appellant and the Building Committee; and on the 4th of March, 1861, the former brought this action against the Respondent to recover the balance that he alleged to be then due to him. The particulars of this demand are stated in the evidence. The balance claimed was £5,000, which included two disputed items, viz., £1,468. 11*s.* 4*d.* for extra work, and £2,586. 0*s.* 7*d.* for damages alleged to have been sustained by the Appellant by reason of the inferior quality of the *Caen* stone that was furnished to him by the Defendant under the contract. The Defendant disputed the liability for damages in respect of the *Caen* stone, and for so much of the sums charged for extra work as was attributable to the work that was caused by the sinking of the Tower. He made a statement of the account between him and the Appellant, whereby the apparent balance due to the latter was $1,795·36. As to this, he insisted, in his pleading, "that the foundations of the said building, and specially of the said Tower, were made to bear a weight of not less than eight tons to each superficial foot; whereas the area of such foundations ought, according to all well-acknowledged rules in the art of building, to have been so extended as not to allow of more than two tons to be sustained on each superficial foot of area; and that, owing to the want of care, attention, and skill on the part of the Plaintiff" (the Appellant), "and the defective, unskilful, and unworkmanlike manner in which he constructed the said building, Tower, and spire, and the consequent injury and damage done to the said building generally, it would cost an amount far exceeding the said sum of $1,795·36, simply to repair such damage, and place the said building, Tower, and spire in the state and condition in which they ought to be under the said contract and specifications." He further alleged "that the said Tower and spire, owing to the want of care, attention, and skill on the part of the said Plaintiff, and the defective, unskilful, and unworkmanlike manner in which they had been so constructed by him, were still sinking and threatening to fall, so

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much so that it would be necessary to take the same down to the foundations and entirely reconstruct the same, including the said foundations—a work which would cost, including the repairs of the building connected therewith, an amount exceeding $30,000." He concluded with an averment that, by reason of the premises, the Plaintiff was not entitled to recover any sum of money from the Defendant; and he prayed judgment accordingly.

To this the Plaintiff replied, that all the work done by him was well and substantially done; that the subsiding of the Tower did not arise from any cause over which he had any control; that as to the alleged defect in the foundations, he was wholly ignorant thereof, and that he had nothing to do with the calculations on which the foundations were constructed, or with the work of constructing said foundations, and never warranted said work, nor was bound to, and was not liable, therefor, and, in fact, never saw the foundations.

The evidence disproved the allegations of negligence or want of skill on the part of the Appellant in the execution of the work done by him; but it showed that the cause of the sinking of the Tower, from the nature of the soil and the insufficiency of the foundation, could have been discovered and provided against, by diligence and skill, before the Appellant entered into the contract or began to build.

From this statement it is obvious that the material question in the case was, whether the Appellant, as the Builder of the Church, was responsible for the damage that was caused by the sinking and subsiding of the Tower? The liability of the Respondent, in respect of the inferior quality of the *Caen* stone, could only have become material if the principal defence had failed. The case came before Mr. Justice *Monk* on the 24th of February, 1862. For the reasons stated in his judgment he maintained the Defendant's plea, and overruled and dismissed the Plaintiff's demand for damages occasioned by the bad quality of the *Caen* stone, and for delays by the sinking of the Tower; and held that the Plaintiff was responsible for the damage caused by the sinking, and that the only sum which the Plaintiff had established as coming to him was a balance of $1,795·36, against which the Defendant was entitled to set up in compensation the amount to which he was entitled

for the damage of which he complained. The amount was ordered to be ascertained by a reference to Experts.

On appeal to the Court of Queen's Bench, this judgment of Mr. Justice *Monk* was affirmed in the month of June, 1864, with this variation, that, for the reasons stated in their judgment, the Court (*dissentiente Meredith*, J.) allowed to the Appellant the sum of $400 to be by him charged as and for extra work, thereby making the balance due upon the contract as and for extra work, the sum of $2,195·36, leaving the same subject to compensation.

After various ineffectual proceedings to get a report of Experts under the Order of the Court, such a report was at last obtained and homologated, and a final decision of the Superior Court was pronounced on the 17th of April, 1867, by which it was adjudged and declared that, inasmuch as it appeared from the report of Experts, &c., that the balance of $2,195·36 was more than compensated, paid, and extinguished by reason of the damages set forth in the plea of the Defendant, and which were occasioned to the Defendant by the sinking of the Tower of the Cathedral, the Plaintiff was not entitled to recover any sum of money for the causes, matters, and things in his declaration set forth; and, therefore, that the action be dismissed with costs, except that each party was to pay the costs of his own Expert.

On appeal to the Court of Queen's Bench, this judgment was affirmed on the 9th of December, 1868, Mr. Justice *Caron* dissenting.

The liability of the Appellant for the damages caused by the sinking of the Tower was not taken to have been created by the contract into which he had entered; but it was held that, by the law of *Lower Canada*, this liability was imposed upon him in his capacity of the Builder of the edifice that he undertook to erect, and that the Contract into which he had entered had neither excluded nor qualified the application of the rule of law. The case, on appeal, therefore, appears to their Lordships to depend on the right apprehension and application of this law, by which a liability is imposed on Architects and Builders, irrespective of contract, that is not so imposed on them by the law of *England*.

The law is thus stated in Article 1,688 of the Civil Code of *Lower Canada*:—"If a Building perish in whole or part within

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ten years, from a defect in construction, or even from the unfavourable nature of the ground, the Architect superintending the work and the Builder are jointly and severally liable for the loss." In Article 1,869 it is provided that, "If, in the case stated in the last preceding Article, the Architect do not superintend the work, he is liable for the loss only which is occasioned by defect or error in the plan furnished by him." The Code, it is true, did not come into operation until the 1st of August, 1866, after the commencement of the action; but the Articles referred to are declaratory, and in part, expressly founded on the case of *Brown* v. *Laurie*, which was decided in 1851 by the Superior Court at *Montreal*, affirmed on appeal by the Court of Queen's Bench in 1854, and has since been considered to be the leading case on this branch of Canadian law. Mr. *Lloyd* contended that this authority, although binding on the Courts of *Lower Canada*, was open to review, and ought to be reviewed, by this Board. But their Lordships are of opinion, that a case decided so long ago by Judges eminently conversant with the law of the Country, and that has since been incorporated into the Civil Code, is not open to be reviewed on this appeal.

It was an action on a contract for building seven Houses in the City of *Montreal*, and a balance was claimed to be due on foot of the contract. The Defendant set up as a defence, that the Plaintiff not regarding his legal liability as Master mason, did not excavate skilfully the foundations, more particularly those of the three centre houses, but laid them on a soft substance, so that the walls, when partly built, gave way. He then set up his claim for the consequential damage against the claim of the Plaintiff. The special reply of the Plaintiff was, that the contract bound him to the specifications, plans, and drawings, and placed him under the direction of an Architect in charge; that the depth of the excavation had been particularly marked out on the said plans and drawings, and had been executed exactly as thereby required; that when the excavation had been so made, a stratum of sand and clay had been found, which had been carefully examined by the Defendant and the Architect in charge, and by them declared sufficient: that thereupon the foundations had been laid; that it was true the three centre Houses had sunk a little more than was usual, which was caused by a mossy earth under the sand and clay, of which

there was no indication; but that there had been no want of skill on the part of the Plaintiff, who had acted in accordance with the Contract and the special orders of the Defendant. The Court held, that it was sufficiently shewn that proper precautions had not been taken to ascertain the nature of the ground by probing or otherwise, but that taking it for granted that the soil was all of the same character, there had been an omission to ascertain the fact in the way in which it ought to have been ascertained.

The reason of the law, as it was explained by Mr. Justice *Day* in giving judgment, is two-fold: first, that the Employer, who is supposed to be unskilled, has a right to expect that the Builder who contracts to build Houses for him will provide that the foundation shall be such that the Houses erected on it shall stand; secondly, "there is a motive of public policy which would subject the Builder to this risk, and renders it necessary that he should take extreme care in the construction of buildings." (1) The ancient law of *France* is that which has prevailed in *Lower Canada*. Mr. Justice *Day* says, as to this law, that "on looking through the Books anterior to the *Code Napoléon*, the Court does not find any express warrantry for what was called, in that Code, '*vices du sol*,' but the expression invariably made use of is, that the Builder was bound to warrant the solidity of the building, which he could not do unless he warranted the solidity of the foundation, and, therefore, the one warranty must be held to include the other."

The Court decided that although the proprietor employs an Architect to supervise and direct the work, and the Builder follows his directions, this does not exonerate the Builder from responsibility, but the law holds him jointly and severally bound with the Architect; and that the importance of guarding life and property makes this rule of law such as not to go beyond the strict bounds of reason. As the Builder had not taken proper and available precautions, and the buildings proved unsound because of the insufficient foundation, he was held to be liable for the consequences.

The learned Judge (*Rolland*) who presided in the Court of Queen's Bench when the case came before it on appeal, adverts to the importance of establishing a rule certain for Architects and Builders, in the execution of works entrusted to them. He states

(1) 1 Low. Can. Rep. 348.

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that the *ancien droit Français* made all the responsibility for defaults to fall on the Builder, and especially those that proceeded from the nature of the soil, because the Builder was bound to know his art, and to make himself sure that the ground was sufficiently solid to sustain the Buildings to be erected. The only restriction attached to this warranty was as to its duration, which was limited to ten years. The rules established by the new legislation in *France*, for deciding questions that might arise on this point, were not (he says) in force in *Lower Canada*. The old French authorities were abundantly cited in the argument, and considered by the Court.

Their Lordships are of opinion, that the case of *Brown* v. *Laurie* is a conclusive authority against the proposition that the work having been done according to the terms of the contract and under the superintendence of an Architect selected by the employer, the Builder is exempted from the liability which would otherwise attach to him. It is, therefore, unnecessary to examine the French authorities on which the learned Counsel for the Appellant relied in order to establish this proposition, whether they are cases decided on the old law of *France*, or on Article 1,792 of the *Code Napoléon*, which (it may be observed) is not identical in its terms with Article 1,688 of the Civil Code of *Canada*.

It has, however, been argued on behalf of the Appellant that, admitting the authority of *Brown* v. *Laurie* to its fullest extent, the case under appeal is not to be governed by it, inasmuch as the faulty construction in this case was in the foundation laid by *Brown & Watson*, and that the Appellant cannot be held liable for the defects in their work. This is, in fact, the ground on which Mr. Justice *Caron* dissented from the judgment of the other Judges of the Court of Queen's Bench.

Their Lordships have not been altogether free from doubt on this point; but, after a full consideration of the learned and able arguments and of the authorities which have been adduced, they have come to the conclusion that the judgment under appeal is correct, and ought to be affirmed.

The broad general rule of law established by the case of *Brown* v. *Laurie*—the rule certain for Architects and Builders in the execution of the works entrusted to them (1)—is that there is annexed

(1) 5 Low. Can. Rep. 69.

to the contract, by force of law, a warranty of the solidity of the building that it shall stand for ten years at least. It was not expressly decided whether this was to be taken as an absolute warranty, or with an implied exception of cases in which the building gives way, within the time, wholly or in part, from causes that could not have been discovered or removed by due vigilance and competent skill. But this at least was expressly decided, that the approval and direction of a supervising Architect, or his omission to ascertain the nature of the soil of the foundation, by known and available tests, does not exonerate the Builder from the consequences of following such direction, or of building on the foundation without making himself sure of its sufficiency.

When there has been a breach of warranty of the stability of the building, the *onus* is on the Builder to shew that he is exempted from liability, by some exception in his favour. It is of primary importance that he should make sure of the sufficiency of the foundation on which he proceeds to build, for without a sufficient foundation the warranty could not be kept. It is an inseparable incident, an essential part of the warranty; the warranty of stability of the edifice includes, by necessary implication, the warranty of sufficiency of foundation; and such is the law as explained in *Brown* v. *Laurie*. The Architect and Builder are, therefore, bound to provide whatever is essential to the stability warranted.

The exemption from responsibility, on the part of the Builder, for the breach of warranty, must be made out (if at all) by legal implication. There is not in the Code any express exception in favour of the Builder; and there is none in his contract.

The exemption for which the Appellant contends is, in effect, that whether the foundation was altogether insufficient; whether it was constructed without the use of known and available tests for ascertaining the nature of the soil; whatever may have been the amount of negligence or want of skill in its construction, and however practicable for him, before he adopted it at his own estimate of its value as the basis of his building, to have ascertained that it was, in fact, insufficient (as it then stood) for such a purpose, yet he was in nowise concerned with the matter, and under no responsibility for the consequences of having upon this foun-

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dation erected the building which he had contracted to erect and complete, subject to the warranty of stability annexed by law. To sustain his contention it must be held that the warranty of sufficiency of foundation is not included in that of the stability of the building, except in the case where the Builder of the building is also the constructor of the foundation. But the sufficiency of the foundation is an inseparable incident to the stability warranted, and could not be the subject of an implied exception. The special responsibility for a breach of the warranty has been incurred by the Builder, not as the Constructor of an insufficient foundation, but because the stability of the edifice erected has in fact failed, and the failure has not been shewn to have been excused by law. If it were otherwise, the law might be evaded by the contractor building only upon a foundation completed by another who was under no obligation to do more than to realize what the Architect had designed, or even what the Employer alone may have directed.

The French authorities relied on by the Appellant, exclusive of such as are inconsistent with what has been decided in *Brown* v. *Laurie*, or such as are under the *Code Napoléon*, may be reduced to those which Mr. Justice *Caron* has selected in support of his judgment.

It is important, moreover, to keep in mind that the authorities which exonerate the Builder from responsibility for a breach of the warranty, when he acts under the guidance of an Architect, are set aside in *Brown* v. *Laurie* on account of the importance of protecting property and life, which makes it strictly reasonable to maintain the responsibility of Architect and Builder alike. Accordingly, if the Builder thinks fit to trust to the vigilance or skill of the Architect, without the independent exercise of his own judgment, he acts at his own risk. He cannot escape from liability when he has omitted to use such known and proper precaution as he ought to have used if he had had the sole and undivided responsibility.

If, then, for the purpose of public safety, the Builder cannot act upon the design and under the direction of the Architect, except upon his own responsibility for the consequences, how can it be consistently maintained that he can, without incurring any such responsibility, adopt and act upon the design of the founda-

tion after it has been realized by the intervention of a third party who has been employed to do, and has done, nothing more than merely realize this design, in conformity with the direction of the Architect or of the Employer? If the public protection requires that the Builder should not act upon the design in the first instance, except upon his own responsibility, it would seem to be not less requisite that he should not be exonerated from a like responsibility if, after it has been realized, he has estimated its value for the purpose of his contract, and adopted it as the basis upon which he erects the building which he has contracted to build, and the stability of which he is bound by law to warrant.

It is further to be observed with reference to the French authorities, that not only are those to be excluded from consideration which proceed upon the opinion that the Builder is not responsible when he follows the design or direction of a supervising Architect, but also the distinction is to be noted which was well pointed out by Mr. *Bompas* in his able argument, between cases founded upon negligence in fact and those that depend simply upon a breach of the warranty of stability. There is a further distinction between the case of a head contractor who is the Master Builder, and that of particular sub-contractors, or distinct and separate Workmen.

In the work of *Fremy-Ligneville, Législation des Bâtiments,* to which Mr. Justice *Caron* refers, the head Contractor is admitted to be equally responsible with the Architect for "*vices du sol.*" "*La sûreté publique*" requires, he says, that they should be so responsible.

Whatever may be said as to "*vices de construction*" in buildings where separate Constructors have been employed, and the responsibility of each of the Constructors has been confined to his own separate part of the work, no authority has been referred to which shews that the Contractor, who is the Builder of the edifice, has been exempted from full responsibility, when it was practicable for him to have ascertained beforehand, by the use of known and available tests, a defect that affects the stability of the building which he has contracted to erect.

The case on which most reliance has been placed on behalf of the Appellant is *Lambert's Case,* reported in *Denisart's* collection of new decisions, *Tom.* iii. p. 313 [Ed. 1784]. In that case an

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Architect prepared a plan of a House which *Lambert*, a Baker at *Marseilles*, approved. A Mason contracted to build according to this plan. The building had been raised to the first storey, under the supervision of the Architect, who perceived the incapacity of the Mason, and caused the contract to be rescinded, and a new agreement was made with another Mason to finish the work. This Mason, under the guidance of the Architect, finished the work. The house soon after fell down. The Public Prosecutor instituted proceedings before the Judges of Police, who condemned the first Mason to pay a fine of 1,000 livres, and suspended him for three years. They acquitted the Architect. The Experts who first inspected the premises during these proceedings, reported that the walls of the foundation were not *aplomb;* that too soft Stones had been used, and that the mortar was thin. A second set of Experts added that the fall of the House was due exclusively to the fault of the first Mason. The second Mason then sued the Employer in the Civil Court of *Marseilles* for compensation for his work and labour, and also for damages for the loss of his tools, &c., which had been lost in the ruins. The Employer cited the Architect and the first Mason in guarantee. The Court condemned the Employer to pay the second Mason the amount due for his work, and also damages for the loss of his tools, and it also condemned the Architect and the first Mason to guarantee the owner from this condemnation, as well as from the damages suffered by him from the fall of the House. The Architect appealed against this sentence, which was confirmed by the Parliament of *Aix* (24th of May, 1740), except as to the damages suffered from the fall of the House.

There is no report of the arguments used, or of the reasons on which the judgment proceeded. The second Mason who was not employed to rebuild, but merely to finish the erection of the House, may not have been taken to be a Builder of the edifice, subject to full responsibility within the meaning of the law of warranty. It was not shewn that the default of the first Mason was such as the second Mason ought to have detected before he began to do his own work. The second report of the Experts is rather to the contrary. The appeal was on behalf of the Architect only; as all who were interested had been made parties to the proceedings, their equities, *inter se*, were adjusted according to the

merits. The principal defaulter—the original Contractor for building the House—was held responsible as well to the public as to the parties who suffered by his default.

No rule or principle of law can be safely collected from this Report, that could or ought to have been considered as authoritative in settling the law of *Lower Canada* otherwise than as it has been settled in the present case, in which the liability of the Architect, or of *Brown & Watson*, has not been put in issue.

It is not necessary for their Lordships to consider what ought to have been the ruling of the Courts in *Lower Canada* if the sinking of the Tower, and the consequent damage, had been shewn to have been caused by a latent defect in the work done before the date of the contract of the Appellant, and which he could not by the exercise of care and skill have discovered. It plainly appears that, when he contracted to build the Cathedral, and accepted the foundation at his own estimate of its value as the basis of his work, he had the means of knowing the nature of the soil; he had the dimensions of the foundation; he had the plans of the Architect before him, and he must be taken to have known the nature and special character of the structure he was about to erect. Applying his scientific knowledge to the subject, he ought to have known that this foundation was insufficient. Their Lordships, therefore, are of opinion that under the law of *Lower Canada* he is liable, just as he must have been if he had in terms contracted to build from the ground on the bare site.

The parties concerned have proceeded on what proved to be a common error, but this cannot alter the rule of law. To use the language of Lord *Mansfield* as to a rule somewhat analogous, "At first the rule appears to be hard, but it is settled on principles of policy, and, when once established, every man contracts with reference to it, and there is no hardship at all." *Barclay* v. *y Gana* (1). The contract here has been drawn up so as not to contain any express provision with a view to exclude or modify the full responsibility imposed by the law on the Appellant. It superadds special clauses, protective of the Employer, by which he is exonerated from contingent liabilities. The Appellant must be assumed to have known the law when he entered into the con-

(1) 3 Doug. 390.

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tract. Whatever the hardship of the case may be, it is not within the province of their Lordships to relieve. Their duty is to decide what the law is by which the case must be governed. The principal point being thus decided against the Appellant, they do not think it necessary to say more on the subordinate questions, and especially on that relating to the *Caen* stone, than that they agree with the Canadian Courts in their conclusion on these points, and in the reasons by which it is supported. Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal be dismissed with costs.

Solicitor for the Appellant: *G. W. Barnard.*
Solicitors for the Respondent: *Bischoff, Bompas, & Bischoff.*

J. C.* 1871 *Dec.* 11, 12.

HELEN SKINNER . . . . . APPELLANT;

AND

SOPHIA EVELINA ORDE, WILLIAM ORDE, CHARLES GRANT BARLOW, AND SOPHIA SKINNER . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE, NORTH-WESTERN PROVINCES, ALLAHABAD.

Guardian—Ward—Custody of Infant—Religion of Father—Religious Education of Minor—Acts, Nos. XL. of 1858, *and IX. of* 1861.

10 L.D. 64
11 L.D. 822

A Child born in *India*, whose Father was a European British subject and a Christian, must be presumed to have the Father's religion, and his corresponding civil and social *status*, and it is the duty of a Guardian to bring up his ward in his Father's religion.

An Infant, the Child of a Christian Father and the issue of a Christian marriage, was left, by the death of her Father, of very tender age, and brought up by her Mother as a Christian during her early youth. Her Mother, after cohabiting with a man having a Wife and professing the

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* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE JAMES, THE LORD JUSTICE MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.
ASSESSOR: SIR LAWRENCE PEEL.

Christian religion, became, with him, a Mahomedan, for the purpose, as it appeared, of giving legal effect to a Mahomedan marriage between them, but which alleged marriage was not proved to have been duly celebrated.

The Infant after attaining the age of fourteen years, and being with her Mother, professed a desire to become a Mahomedan in religion, and adopted the Mahomedan mode of life. The Courts in *India* having been applied to, under the circumstances, by her relatives, to remove the Infant from the custody of her Mother, made an Order under the provisions of the Acts, Nos. XL. of 1858 and IX. of 1861, and placed the Infant under a Christian Guardian. Such Order, on appeal, confirmed by the Judicial Committee.

IN this case special leave to appeal was allowed (1) from an Order of the Judge of *Meerut*, dated the 19th of May, 1870, and Orders of the High Court of Judicature for the *North-Western Provinces*, at *Allahabad*, dated the 7th of July and the 16th of July, 1870, whereby *Victoria Skinner*, an Infant of the age of fourteen years, was ordered to be removed from the custody of her Mother, the Appellant, and Guardians of her person and property were appointed.

The facts of the case, as they appeared from the petition and evidence in the cause, were as follows :—

Victoria Skinner, the Minor, was the Daughter of *George Skinner* deceased, and the Appellant his Wife. *George Skinner* was the illegitimate Son of a native woman by a European Father. During his lifetime, and at the time of his death, *George Skinner* professed the Christian religion, and he was married to the Appellant in a Christian Church according to the Christian rites. He was killed at *Delhi* at the outbreak of the mutiny in the year 1857.

After her Father's death *Victoria Skinner* remained with her Mother until she was removed from her custody and placed under the care of the Respondent, *Sophia Skinner*, by the Order of the Judge of *Meerut*. *Victoria Skinner* was entitled to a fortune estimated at Rs.100,000, derived from an indigo estate (known as the *Skinner* estate), in which her Father had a share at the time of his death. Her income was stated to be Rs.400 *per mensem*.

It appeared, that in the latter part of the year 1867, the Appellant formed a connection with a person named *John Thomas John*, who had formerly professed the Christian religion, but had

(1) Law Rep. 3 P. C. 451.

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then recently become a Mahomedan. He had at that time a Christian Wife, living at *Agra*, to whom he had been married in the year 1859, but whom he deserted in order to live with the Appellant; and from the year 1867 the Appellant continued to live, and at the respective dates of the Orders appealed from she was living, with him as his mistress or so-called Wife, and it appeared from the evidence that in the year 1869 she had a child by him, which died. It further appeared, that the Appellant never professed any religion other than Christianity at any time before she formed the connection with *John Thomas John*. She then adopted and had since professed Mahomedanism. Mr. *John*, in his evidence, stated that he embraced the Mahomedan faith in October, 1867, and that he contracted a Mahomedan marriage with the Appellant on the 24th of that month, but no Witness was called to prove such marriage; and he admitted, on cross-examination, that towards the end of 1868, or the beginning of 1869, he denied the facts of the alleged marriage and of his change of faith to the Judge in whose Court he held a situation.

In the month of April, 1869, the Appellant and Mr. *John* removed *Victoria Skinner*, who was then thirteen years of age, from the school at *Meerut* which she was attending, and withdrew her from all Christian associations. It appeared from the evidence that previously to that time *Victoria Skinner* had been brought up and treated as a Christian. She wore the European costume, and was not kept in seclusion, but regularly went to school, and in other respects conformed to European habits. From the time of her removal from school in April, 1869, her education appeared to have been totally neglected. She resided entirely with the Appellant and Mr. *John* in seclusion behind the *purdah*, and under the influence of these associations, as it was alleged, she was induced to renounce Christianity and profess the Mahomedan religion. Under these circumstances the Respondents presented a petition in the Court of the Judge of *Meerut* on the 21st of March, 1870, and thereby prayed that Guardians might be appointed to the person and property of the Minor, and that an account might at once be taken of the receipts and expenditure on behalf of the Minor from the Appellant and Mr. *John*. On the 22nd of March, 1870, the Judge of *Meerut* made an Order, that pending a final Order

the Minor should be placed under the temporary charge and custody of the Respondent, *Sophia Skinner*.

The Appellant and Mr. *John* by their answers to the petition, submitted that the Court had no jurisdiction to entertain the Respondent's application; that the petition was presented, not for the purpose of furthering *Victoria Skinner's* interests, but from hostile feelings towards Mr. *John;* that the Appellant was not, and never had been, Mr. *John's* mistress, that a marriage, legal according to Mahomedan law, had taken place between them, and had been recognised by the Petitioners; that the Appellant and Mr. *John* were not desirous of depriving *Victoria Skinner* of education and Christian associations, and that her own wishes as to her guardianship and religion ought to be consulted. The objection to the jurisdiction of the Court was based on the ground that the Minor was a European British subject, but that objection was overruled by the Judge of *Meerut*, Mr. *G. D. Turnbull*, who, under the Act, No. XL. of 1858, made an Order, dated the 19th of May, 1870, directing that the Minor should be removed from her Mother's care, that the charge of her property should be placed under the Collector of the District, and that another Guardian should be appointed for her person, the selection of such Guardian to be made either by the Court or by consent of the parties themselves.

The Appellant and Mr. *John* appealed against that Order to the High Court of Judicature for the *North-Western Provinces, Allahabad*. The reasons stated in the petition were; first, that the District Court at *Meerut* had no jurisdiction to entertain the petition presented by the Petitioners; secondly, that the evidence established that no influence was used to induce *Victoria Skinner* to change her religion; thirdly, that assuming that the Judges found that undue influence had been used, yet the exercise of such influence was no sufficient reason for depriving the Mother of the custody of her child; fourthly, that it was manifest that the petition was presented not for the purpose of protecting the interest of *Victoria Skinner*, but from feelings of enmity entertained by the Petitioners against the Appellants, and, lastly, that *Victoria Skinner* was entitled to select what religion and what Guardianship she pleased.

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The appeal was heard before Mr. *C. A. Turner,* officiating Chief Justice, and Mr. *R. Spankie,* one of the Judges of the High Court, who delivered the judgment of the Court on the 7th of July, 1870. By that judgment the High Court confirmed the Order of the Court below, so far as it directed the removal of the Minor from the custody of her Mother, and directed the appointment of a Guardian of her person, but they considered it desirable to cancel the Order placing the property of the Minor under the charge of the Collector, and substituted for it directions for the appointment by the Court of a Guardian of her property. The grounds upon which the High Court confirmed the Order for the removal of the Minor from the Appellant's custody were thus stated in their judgment:—

"Whether or not a marriage has been duly celebrated in accordance with the rites of the Mahomedan law between the Appellants, that marriage could not be regarded by a Christian as valid during the lifetime of *John Thomas John's* Christian Wife. Looking at the matter from a Christian point of view, *Helen Skinner* is living in adultery with *John Thomas John.* It is also manifest that the Appellants have worked upon the Minor, to induce her to profess herself a Mahomedan. Has, then, the Judge erred in directing that the Minor be removed from the custody of the Mother? We answer that question in the negative. The Judge, in the exercise of his jurisdiction, under Act, No. XL. of 1858, is in our opinion justified in having respect to the religion professed by the Father of a Minor, and in passing such Order with regard to the custody of the person of the Minor as he may hold to be in accordance with what would have been the Father's wishes, had he been alive to express them. It cannot be supposed that the Father of the Minor would have considered a woman, who, in his view, would have been leading a life of adultery, would be a suitable Guardian for his child, nor is it to be presumed that he would have desired that she should be educated in a religion other than that which he himself professed. We do not desire to be understood as holding that a mere change of religion would justify the Court in removing a Child from the custody of the Mother, but where, under colour of her change in religion, a Mother forms a connection or leads a life which, by persons professing her

Husband's faith, would be deemed immoral, we hold that she thereby ceases to be a proper person to be entrusted with the education of her Child."

By a further Order of the High Court, of the 16th of July, 1870, it was ordered, that Miss *Scanlan*, of *Mussoorie*, be appointed Guardian of the person of the Minor. And it was further ordered, that Miss *Scanlan* should receive such reasonable remuneration for the charge of taking care of and providing duly for the education and maintenance of the Minor, in a manner suitable to the fortune of the Minor, and in accordance with her reasonable wishes, as should be determined by the Court on the presentation of a scheme for the management of the property by Mr. *T. Bailey*. And it was further ordered that the relatives of the Minor, and among them the Mother of the Minor, might have reasonable access to the Minor at such times and seasons as might be right and convenient, but the permission thereby granted was expressly declared not to extend to *John Thomas John, alias Jan Mahomed*, claiming to be the then Husband of the Mother of the Minor.

By another Order of the High Court, on the same day, *Thomas Bailey* was appointed Guardian of the property of the Minor, and a certificate of administration granted to him for the purpose, the remuneration to be at the rate of Rs.5 *per cent.* on all such sums as might come into his hands on the account of the Minor, and Mr. *Bailey*, at his earliest opportunity, was to inform the Court of the amount of income accruing from the property of the Minor, and should propose a scheme shewing the amount to be expended on the education of the Minor, and the amount (if any) which might remain available for investment, after disbursing all such necessary expenses, and also the fund, or funds, in or upon which any such balances might be invested.

The Appellant having obtained special leave (1), brought the present appeal against the Order of the Judge of *Meerut* of the 19th of May, 1870, and the Orders of the High Court of the 7th and 16th of July, 1870.

Sir *R. Palmer*, Q.C., and Mr. *Cave*, for the Appellant :—

This is a question involving the right to the guardianship of an infant Mahomedan, over whom the jurisdiction of the Courts in

(1) Law Rep. 3 P. C. 451.

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India has been exercised under Acts, No. XL. of 1858 and IX. of 1861. The Appellant, the Mother of the Infant, *Victoria Skinner*, has, by an Order of the High Court, been removed from the custody and guardianship of her Daughter, an Infant of the age of fourteen years. The second section of the *Minors Act*, No. XL. of 1858, gives jurisdiction to the Civil Court over the persons and property of Minors not under the protection of the Court of Wards, and not being European British subjects; the provisions of which Act are extended by the subsequent Act, No. IX. of 1861. The legal *status* and the rights of the Minor's Father have been already decided by this Court in the case of *Barlow* v. *Orde* (1), where it was held that the family in truth followed no particular religion. The special leave to appeal was granted on statements contained in the petition of the Appellant supported by the joint declaration of herself and her Husband, *John Thomas John*, but the Court below acted on the allegations contained in the original petition of the Respondents presented to the Court of the Judge of *Meerut;* but we insist, that the allegations contained in that petition were not proved, and that if they had been, they were not sufficient to warrant the Orders either of the Court at *Meerut* or of the High Court. The effect of the Order of the High Court is to direct that the Minor be brought up in the Christian religion, against the manifest wish and desire of the Infant herself, and contrary, as we conceive, to the Law and justice of the case. Now, the Father of the Infant having appointed no Guardian, and the Infant being at his death of the age only of one and a half years, the Mother was the natural Guardian for nurture, and was entitled to the custody of the Child, subject, of course, to the right of the Court, in its discretion, to interfere and direct its education, as directed by Act, No. XL. of 1858, sect. 26. A Mother is only removable on the ground of immorality: *Rex* v. *Greenhill* (2); *Reg.* v. *Clarke* (3); *In re Moore* (4); *In re Curtis* (5). In the last case it was held, that the Court of Chancery would not interfere with the legal custody of a child by taking it from its Father, simply with reference to what was most for the Infant's benefit. In

(1) Law Rep. 3 P. C. 164.
(2) 4 A. & E. 624.
(3) 7 E. & B. 186.
(4) 11 Ir. C. L. Rep. (N. S.) 1.
(5) 28 L. J. (Ch.) 458.

Erskine Perry's Oriental Cases in the Supreme Court of *Bombay* there are two cases the converse of that decided by the High Court, *Reg.* v. *Shapuri Bezonji* (1), in that case a Parsee family detained an infant Child from its Father on the ground of the Father having embraced the Christian religion. The Supreme Court at *Bombay*, on a Writ of *habeas corpus*, ordered the Child to be given up to the Father, and in the case of a Brahmin convert, *Reg.* v. *Nisbett* (2), that Court ordered a Hindoo boy of twelve years old to be delivered up to his Father, and refused to examine the boy as to his capacity and knowledge of the Christian religion, or as to his wishes to remain with his Christian instructor. The assumption by the High Court that the Appellant was leading an immoral life was not warranted by the facts of the case; the Appellant's marriage with *John Thomas John* was valid, and sufficiently proved. It was performed in the presence of Witnesses, which is all that is requisite by the Mahomedan Law: *Hamilton's Hedaya*, Vol. I., Book II., ch. I., p. 25 [Ed. by Grady].

It is clearly not for the Infant's benefit that she should be separated from her Mother. The general rule of English Courts regarding the bringing up of the Infant in the Father's religion is not disputed: *Austin* v. *Austin* (3); *In re Newbery* (4); but that rule is not applicable here, there is no certainty what the Father's faith really was: *Barlow* v. *Orde* (5). Here the Infant is of sufficient age to select for herself what faith she prefers, and has, upon due deliberation, chosen the Mahomedan. In *In re Connor* (6) the Court refused to take a Child of tender years from the custody of its Mother on the ground that the Mother's religion differed from that of the deceased Father. The rule that the Father's religion is to be enforced is subject to the discretion of the Court, whether or not it is for the welfare of the Child. In *Stourton* v. *Stourton* (7) it was held that, whatever the religion of the Mother is, provided she is not immoral, the Court would not, when the infant is old enough, have his religious views interfered with. Here the Infant is of the age of fourteen years: *Witty* v. *Marshall* (8).

(1) Perry's Oriental Cases, p. 91.
(2) Ibid. p. 103.
(3) 34 Beav. 257, 265. 11 Jur. N.S. 501
(4) Law Rep. 1 Eq. 431. 12 Jur. N.S. 20
(5) Law Rep. 3 P. C. 451.
(6) 16 Ir. C. L. Rep. (N. S.) 112.
(7) 8 De G. M. & G. 760. 3 Jur. N.S. 527
(8) 1 Y. & C. (N. R.) 68.

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Mr. *C. E. Pollock*, Q.C., Mr. *Horace Davey*, and Mr. *M. D. Chalmers*, for the Respondents:—

The Order of the Judge at *Meerut*, as well as those of the High Court, were justified under the Acts, Nos. XL. of 1858 and IX. of 1861, which give ample jurisdiction over Minors in such cases as this. The Father was undoubtedly a Christian, he was married according to the form of the Church of *England*, and professed that religion up to the time of his death. When the Father has not left any expressed direction as to the religion in which his children are to be educated, the Court will assume that his wishes were that they were to be educated in his own religion: *In re North* (1). The rule of the Engish Courts, that the Child should be brought up in the Father's religion, therefore, is applicable; and it is the duty of the Guardian to bring the Minor up as a Christian, and the Court will control the Guardian, *Jones* v. *Powell* (2), unless there are circumstances which take the case out of the rule: *Stourton* v. *Stourton* (3); *Hawksworth* v. *Hawksworth* (4); *In re Darcys* (5); *Reg* v. *Clarke* (6); *In re O'Malleys, Minors* (7). The English law must be the governing rule in this case: *Abraham* v. *Abraham* (8). The Acts, Nos. XL. of 1858 and IX. of 1861, have amply provided for such a case as this, and have been properly applied by the Courts below. Nothing could be more impolitic, as well as inexpedient, than that this Tribunal should interfere with the discretion exercised by the Courts in *India* in a matter affecting so materially the interests of the Infant. The Mahomedan law is wholly inapplicable, as it applies only when the whole family are Mahomedans. It does not recognise such a state of things as exists in this Country. The laws of marriage and the custody and control of Infants by their Guardians provide for the protection of a Minor so situated as the Infant here.

1871 Dec. 11.

Their Lordships' judgment having been reserved, was now delivered by

THE LORD JUSTICE JAMES:—

This is an appeal from an Order of the High Court of the

(1) 11 Jur. 7.
(2) 9 Beav. 345.
(3) 8 De G. M. & G. 760.
(4) Law Rep. 6 Ch. Ap. 542.
(5) 11 Ir. C. L. Rep. 298.
(6) 7 E. & B. 186.
(7) 8 Ir. Ch. Rep. 291.
(8) 9 Moore's Ind. Ap. Cases, 237.

(3) S C 3 Jur. N.S. 527

North-West Provinces, in substance confirming an Order of the Judge of the Court of *Meerut*, removing an Infant ward and her property from the custody and guardianship of her Mother, the Appellant, and the alleged second Husband of that Mother.

The application was made to the Judge under the provisions of the Indian Act, No. IX., 1861, which are as follows:—

"1. Any relative or friend of a Minor who may desire to prefer any claim in respect of the custody or guardianship of such Minor, may make an application by petition, either in person or by a duly constituted Agent, to the principal Civil Court of original jurisdiction in the District, by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the Petitioner, or his Agent if he appear by Agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such Minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such Minor.

"2. The Court may direct that the person having the custody or being in possession of the person of such Minor shall produce him or her in Court, or in any other place appointed by the Court, on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such Minor as may appear proper.

"3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their Agents if they appear by Agents, and such evidence as they or their Agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such Minor and the costs of the case."

The Judge accordingly, after hearing the case presented to him, made an Order, removing the Ward from the custody of her Mother. An appeal from this Order was presented to the High

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Court, which Court pronounced the final Order now complained of. The Act, IX. of 1861, gives no further appeal, but on the statement made to this Tribunal that the question really involved the religious education of a Ward, special leave was given by Her Majesty, on the recommendation of this Board, to prosecute the appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the Judge of the Court of *Meerut;* and it is, obviously, of very great assistance to the Courts in *India*, and to this Board, to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this Country have thought it best to act for the protection and welfare of infant Wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court, that in the matter of religious education great and, in the absence of controlling circumstances, paramount, weight should be given to the expressed or implied wishes of the deceased Father. It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English Fathers to appoint Guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case, to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the Infant ward, and to have given the Judge (subject, of course, to appeal) the power and to have imposed on him the duty of doing what, in his judgment, is best for the Infant; and no other power or duty.

In *India*, however, all, or almost all, the great religious communities of the world exist, side by side, under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsee, and Sikh are one nation, enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of Husband and Wife, parent and child, the descent, devolution, and

disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a Child in *India*, under ordinary circumstances, must be presumed to have his Father's religion, and his corresponding civil and social *status;* and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a Guardian to train his Infant ward in such religion.

What are the facts of the present case? Beyond all question the Ward was the Child of a Christian Father, the issue of a Christian marriage. She was left an infant of very tender years, her Father being one of the victims of the great outbreak and massacre at *Delhi* in the year 1857. She remained thenceforth under the protection of her Mother, a Lady, apparently, of ancestry not Christian, and with no great knowledge of Christian tenets, or attachment to Christian habits. But she was married to a Christian in a Christian Church, and does not appear to have professed any other faith, or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The Child up to that time had certainly been brought up and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred. The house of the Widow became the house of one *John Thomas John*, a Clerk of inferior grade in the Judge's Court, and they lived and cohabited together as Husband and Wife, *John Thomas John* being already the Husband in Christian marriage of a living Christian Wife. It is suggested that this union was sanctified and legalized in this way—that the Widow became a Mahomedan, that *John Thomas John* became a Mahomedan, and that, having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the Widow, the Appellant.

The High Court expressed doubts of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

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But however this may be, their Lordships can entertain no doubt, that when the connection between *John Thomas John* and the Widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become, in fact, the home and guardianship of *John Thomas John*. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the Child might be sent to a proper school—a proper Christian school; and *John Thomas John* and his alleged Wife, professing to yield to the suggestion, took the girl in June, 1869, up to *Simla*, with the avowed object of placing her at a Christian school there. They now represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the Oriental mode of feminine life in seclusion behind the *purdah;* and that at some period (the time is not exactly fixed) a *Moulavie* was introduced, who confirmed her in her resolution to become a Mahomedan. The young Lady, who by this time had attained the age of fourteen years, or thereabout, made the following deposition:

"I know Mr. *John*. I first knew him when we came to *Meerut*, and for the past two years know him well. No one has ever persuaded me to be a Mussulmani. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the *purdah* by my own free will. I went up to *Simla* with my Mother and Mr. *John*. They wished me to go to school, and pressed me very much to go, but I would not consent. I heard of the marriage of my Mother to Mr. *John* five or six days after it took place. I cannot say how long Mrs. *James Skinner* has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. *Skinner's* family must have known of it. I wish to return to my Mother. I believe Mrs. *James Skinner* to be a Mussulmani; Mrs,

Orde to be a Christian. To Counsel for Petitioners.—My Mother can read very little—small story Books; but she cannot read Persian, nor write at all. She can only read the *Urdu* in print, not the written character, excepting very good text-hand. I have read easy books on religion in *Urdu*, but not studied them. I am studying the *Koran* with a Teacher. There was a picture of my Father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I, therefore, destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the Hills. I heard that to keep pictures was prohibited after my return from the Hills, from a Preacher, a *Moulavie*, who came to the house and preached a sermon. No one advised me otherwise. I had long thought of becoming a Mussulmani, but when I was young did not understand the different religions; when I returned from the Hills I turned my attention to it, and had the Preacher called to preach. Almost all my family are Christians. I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. *Benu*. Since I have been in their house I have not had any Letter of any kind from Mr. *John*. I had some Letters from my cousin *Sophy*, who is in *Calcutta*, and *Charlie*, which were on my table. These I sent for. Two from *Charlie* I sent for the day before yesterday, which were old, and I tore them up; the other from *Sophy* I sent for yesterday, and showed it to Mrs. *Aldwell*. The two from *Charlie* I sent for by *Achakrai*, and the one from *Sophy* by my *Ayah*. To Counsel for Petitioners.—I know Mrs. *Benu*. I have seen her several times since I came from *Simla*. I know her to be a Christian. This evidence was, with the consent of the Counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the Country, *Urdu*, recorded by the Court in English, and was read other to the Witness in *Urdu*, and by her acknowledged to be correct."

The case of the Appellant in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young Lady's present religious convictions and natural feelings as was involved in tearing her from

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her Mahomedan home and Mother, and committing her to the care of a Christian strange schoolmistress.

The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in July, 1870, the Order for the appointment of the Guardian, which would have been the only possible Order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy, of course, for a Mother, under such circumstances, to procure from a young Daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school; and it is impossible, in their Lordships' judgment, to believe that in the interval which had occurred between the visit to *Simla* and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training which she ought to have long previously and without interruption enjoyed. Their Lordships are, therefore, of opinion, that the Order, in so far as it removed the Ward from her Mother and alleged stepfather, and placed her under a Christian Guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that in their opinion the Order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the Ward concerning her future position; and considering the present age of the young Lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the Order, their Lordships feel that it would be very difficult for an appellate Tribunal in this Country to interfere without injury, as to the details of the particular guardianship and scheme, which must so essentially be a matter of

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quasi parental discretion to be exercised on the spot by those best acquainted, or best able to acquaint themselves, with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court in *India* in similar cases, that while selecting a School (such, for example, as Miss *Scanlan's* in this instance) it would be desirable, where practicable, to have some independent person as Guardian, to whom the Ward could apply, in whom the Court and the Ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

Solicitors for the Appellant: *Watkins & Lattey.*
Solicitors for the Respondents: *Ellis & Ellis.*

In re JOHNSON'S PATENT (WILLCOX & GIBBS).

J. C.* 1871 June 17.

Letters Patent—Invention communicated by Foreign Inventor—Petition for prolongation of term—Principles regulating the exercise of discretion of granting an extension of Patents previously patented abroad.

Exposition of the principles which regulate the Judicial Committee in recommending the Crown to extend the term of Letters Patent of an invention, consisting of a communication from a Foreigner residing abroad, who had previously to the English Patent taken out a Patent for the same invention in a Foreign State.

Decision in *In re Betts' Patent* (1) approved of.

Poole's Patent (2) observed on.

Where there were several Opponents; on dismissing the petition a lump sum was awarded the Opponents, to be divided *pro ratâ* for costs.

Post 85-6 -93 -96-97

THIS was a petition of *Willcox* and *Gibbs*, both of *Virginia*, in the *United States of America*, and *Regent Street, London*, manufacturers of sewing machines, for a prolongation of the term of Letters Patent dated the 15th of July, 1857, granted to *John Henry Johnson*, of *Lincoln's Inn Fields*, for an invention of "Im-

* *Present:*—SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

(1) 1 Moore's P. C. Cases (N.S.) 49. (2) 4 Moore's P. C. Cases (N.S.) 452.

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provements in Sewing Machines," being a communication from the Petitioner, *Gibbs*, of *Virginia*, in the *United States of America*.

The petition set forth, that the invention comprised in the Letters Patent was the sole invention of the Petitioner, *Gibbs*, after great personal application and considerable expense, and that such invention was of great utility and beneficial to the public; that *Johnson* applied for and obtained the grant of the Letters Patent as the Agent and Trustee for the Petitioner, *Gibbs*, who was, at the date of the Letters Patent, entitled to the whole beneficial interest therein; that the Petitioner, *Willcox*, was at the date of the Letters Patent engaged in the manufacture and sale of sewing machines; that in April, 1866, a Joint Stock Company was formed, under the laws of the *State of New York*, in the *United States of America*, with the title of "*The Willcox, Gibbs, Sewing Machine Company*," of which the Petitioner, *Willcox*, was President, to which Company the entire business of manufacturing and selling the machines was transferred; that the advantages secured by the use of the invention were, firstly, simplicity of construction in the manufacture of sewing machines working with one thread; secondly, certainty in operation, an essential feature in such sewing machines; thirdly, much greater rapidity in operation, thus effecting great economy in the time of the Operator and in the wages account of the Manufacturer; fourthly, greater simplicity of operation, thus largely extending the usefulness of sewing machines among all classes, particularly in families, and greater economy for trade purposes in permitting the employment of less skilful operatives; fifthly, greater readiness to accomplish work without troublesome preparation, thus rendering machine work possible in many cases where it had not been before; sixthly, superiority of product over all other single-thread machines in strength and reliability of seam, and over what are known as lock-stitch machines in the strength and elasticity of seam and its capability of being removed without injury to the fabric, and over the double-loop stitch in making a seam the reverse of which is much more sightly and less liable to be worn off in ironing and wear; seventhly, it secured greater durability than any prior sewing mechanism by reducing the reciprocating movement common to other sewing machines to a simple con-

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tinuous rotary movement, whereby the jar and consequent rapid wear and derangement is avoided. That it also secured silent operation, perfect silence so far as the operation of the revolving looper is concerned, while the stitch-forming apparatus in all other systems produces more or less noise when in operation. The petition then stated, that owing to heavy litigation and mismanagement of the business in *England*, the patent had been, until during the last three years, almost wholly unproductive, and prayed for a further extension of the term of the Letters Patent for seven years.

It appeared that Letters Patent for the same invention had been taken out in *America*, in *France*, and in *Belgium*.

Caveats were entered and objections filed, which, in substance, stated that *Johnson* was not the actual Inventor, but only the importer of an invention introduced in *England* by a communication from a Foreigner residing abroad; that the original Foreign patent had expired, or was about to expire, and that the French and Belgian Patents had expired or become *de facto* or *de jure* void; that no machine had ever been made by the Patentee or his assigns in this Country; and that the patent was wholly and solely for the benefit of the Manufacturers in *America*. It was further objected that the machine, the subject of the patent, could be made cheaper in this Country, and that the results of the manufacture abroad had been to increase the price of the machine, and it was stated that very large profits had been made by the manufacture and sale of the machines, and that the Petitioners had been unwilling to grant licences to make the machines, but were desirous of retaining the monopoly in their own hands, and by vexatious suits and law proceedings had done great injury to persons engaged in the sewing machine trade.

Mr. *Grove*, Q.C., Mr. *Webster*, Q.C., and Mr. *Lawson*, for the Petitioners:—

Referred to the following cases as illustrating the general principles which regulate the Judicial Committee in recommending, in their discretion, an extension of the term of Letters Patent, founded on a communication from a Foreigner abroad who had taken out a Foreign Patent anterior to the English Patent: *In re*

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Newton's Patent (1); *In re Newton's Patent* (2); *In re Betts' Patent* (3); *In re Hill's Patent* (4); *In re Poole's Patent* (5).

And, as to the deduction in taking the accounts of a Manufacturer's profits, where the Patentee was a Manufacturer of the patent article, the cases of *In re Hardy's Patent* (6), *In re Galloways' Patent* (7), and *In re Muntz's Patent* (8) were cited.

Mr. *Aston*, Mr. *A. Charles*, and Mr. *Benjamin*, appeared for the Opponents, and

Mr. *Archibald*, for the Crown, but were not called on.

Their Lordships' judgment was delivered by

THE LORD JUSTICE JAMES:—

Their Lordships will not trouble you, Mr. *Archibald*, or the other Counsel.

Their Lordships having had time to consider the matter have come to the conclusion, that the facts are really not sufficient in this case to make it their duty to recommend Her Majesty to grant an extension of the term of this Patent.

The principles upon which this Board deals with applications of this nature are so well expressed by Lord *Kingsdown* in *In re Hill's Patent* (9), that I think it may be as well to repeat them here. Their Lordships there say (10): "It may be collected from what has been already said, that in determining whether to recommend the prolongation of a patent or not, even where the claim to a first discovery, and the beneficial nature of that discovery, are both conceded, it will be still proper to consider both the degree of merit as Inventor, and the amount of benefit to the public flowing directly from the invention. A monopoly limited to a certain time is properly the reward which the law assigns to the Patentee for the invention and disclosure to the public of his mode of proceeding. Whether that term shall

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(1) 14 Moore's P. C. Cases, 156.
(2) 15 Moore's P. C. Cases, 176.
(3) 1 Moore's P. C. Cases (N.S.) 49.
(4) Ibid. 258.
(5) 4 Moore's P. C. Cases (N.S.) 452.
(6) 6 Moore's P. C. Cases, 441.
(7) 1 Web. Pat. Cases, 729.
(8) 2 Web. Pat. Cases 120.
(9) 1 Moore's P. C. Cases (N.S.) 258.
(10) Ibid. 264.

be extended, in effect whether a second patent shall be granted for the same consideration, and the enjoyment by the public of its vested right be postponed, is to depend on the exercise of a discretion, judicial indeed, yet to be influenced by every such circumstance as would properly weigh on a sensible and considerate person in determining whether an extraordinary privilege, not of strict right, but rather of equitable reward, should be conferred. Now, a person may be an Inventor within the legal meaning of that term—no one before him may have made or disclosed the discovery in all its terms as described in his specification—but this may have been the successful result of long and patient labour, and of great and unaided ingenuity, without which, for all that appears, the public would never have had the benefit of the discovery; or it may have been but a happy accident or a fortunate guess; or it may have been very closely led up to by earlier, and in a true sense more meritorious, but still incomplete experiments. Different degrees of merit must surely be attributed to an Inventor under these different circumstances. The moral claim to an extension of the term may in this way be indefinitely varied, according as the circumstances approach nearer to one or the other of the above suppositions. The same principle will apply to the considerations of benefit conferred on the public. The extent of the benefit conferred must vary in each case with the circumstances. The principal question always is, has the individual Patentee, under all the circumstances, received what in equity and good conscience may be considered a sufficient remuneration?"

A good deal of argument before us was addressed to the consideration of cases which are supposed to be, and which appear to some extent conflicting, as to its being within our power legally to extend the terms of the Letters Patent, even if we should be disposed to consider the circumstances sufficient to induce us to make a favourable recommendation. Their Lordships do not think it necessary to go into any detailed examination of these cases, but they are satisfied to adopt the rule as laid down in *Betts' Patent* (1), which is one in which the matter underwent the fullest consideration, and they are satisfied that the decision in

(1) 1 Moore's P. C. Cases (N.S.) 49.

J. C. 1871 *In re* JOHNSON'S PATENT (WILLCOX & GIBBS.

that case was a right decision, namely, that an English Patentee obtaining a patent abroad for his invention, in addition to his English patent, that the English Patentee is in no sense to be prejudiced either with respect to his original patent, or with respect to any application which he may be advised to make for a renewal of it.

Their Lordships are also of opinion, that an English Patentee who has obtained a patent from abroad, may make out a case for a prolongation of his patent, but they must have regard to all the circumstances of the case. They must have regard to the antecedent circumstances, the effect of which the Legislature itself has thought of so much importance as to make it absolutely impossible for the Crown in some cases to grant a renewal of a patent, or even to extend a patent beyond the duration of the Foreign patent, whether the invention is in its origin and domicile a Foreign invention or an English invention, and that difference their Lordships think they must have regard to in considering this application. Now, beyond all question, here the origin and domicile of this invention, and of the patent and of the manufacture protected by it, are American. If the Commissioner in *America* had not in the exercise of his discretion thought fit to prolong the term of the Letters Patent, then the English Letters Patent would necessarily have come to an end, and it would not have been within the power of the Crown to have granted a renewal or extension of the term for which the patent was originally granted. So if the French patent or the Belgian patent had been taken out before the English patent—it being a mere accident which was first in point of date—it would have been impossible to have granted a renewal of this patent, and to extend the length of the term for which the Foreign patent taken out first would have existed.

Then we have to consider under these circumstances whether, with respect to the Foreign patent so situated, we ought to recommend Her Majesty to grant a renewal?

What are the merits of the case? The merits of the case, so far as regards the English patent, appear to their Lordships to be *nil.* The Patentee, by taking out a Patent in *England,* has in effect secured to himself a monopoly during a period of fourteen years of the sale of articles manufactured in *America,* and

exported from *America* here, which would have been manufactured there and exported to this country quite in the same way if no English patent had been taken out, but with this difference, that the Patentee would not have had the monopoly of his Patent, and would not, therefore, have had any opportunity of securing the monopoly of prices. The merits, therefore, so far as regards the introduction of the invention into this Country, seem to their Lordships to be nothing.

As regards the merits of the invention itself we take it to deserve fully all that was said in its favour by Mr. *Grove*. The merits, so far as respects the Patentee, seem to their Lordships to be sufficiently illustrated by the fact that the Patentee has had a monopoly of fourteen years in this Country, and has also had a monopoly of fourteen years in *America*, which has been extended in *America*, possibly upon considerations peculiar to *America*, with regard to the benefit that the Patentee has bestowed upon American Manufacturers, for a further term of seven years. He has had a monopoly in *France* and in *Belgium*. Their Lordships think such monopoly is a sufficient reward for the invention, great as it is, as far as *England* is concerned, although the American Commissioner appears to have thought it proper to grant a further extension in *America*, having regard to whatever may have been the considerations applicable to the peculiar circumstances in that Country.

Their Lordships have had before them the accounts; and, taking the accounts exactly as stated by the Petitioners themselves, it appears that they have made upon the English business a profit of £7,000, with a reduction of £1,580, making £5,400, upon the accounts as taken by him, and which their Lordships have had no opportunity of hearing commented upon by the Opponents. The profit of the American business is stated to be £16,000, with respect to which their Lordships think that is a very large sum, even for an invention of the importance which Mr. *Grove* has described, which is not the invention of the sewing machine itself, nor of the principle of the sewing machine, but the improvement of a very ingenious inventor, who has added to it an addition—a very ingenious mechanical contrivance—by which a better seam is produced, and by which it is produced noiselessly. No doubt it is a

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matter of considerable importance, but the profits are said to be profits of the Manufacturers; and that their Lordships ought to take that into consideration. Upon that point their Lordships will refer to what was laid down by Lord *Cairns* in *Saxby's Patent* (1), in which his Lordship says: "It has been decided, more than once, by this Committee, that where a Patentee is also the Manufacturer, the profits which he makes as Manufacturer, although they may not be in a strict point of view profits of the patent, must undoubtedly be taken into consideration upon a question of this kind," and that "the possession of the patent virtually secures to the Patentee his power of commanding orders as a Manufacturer." That, as it appears to their Lordships, is really an exact description of the present case, and is a point intimately connected with the Manufacturers, that the possession of the patent has brought to the Patentee the power of commanding orders as a Manufacturer.

It was again suggested to their Lordships that they ought not to take in consideration any of the profits made in *America*, and reference was made to *Poole's Patent* (2). Their Lordships desire it to be understood that that case is not to be considered as laying down any general rule of law. Whatever may have been the peculiar circumstances of that case, in which their Lordships, exercising their discretion, thought fit not to take into account the American profits, that is not to be considered as laying down any general rule. Their Lordships are of opinion, that where the question to be considered is, whether an invention has been sufficiently remunerative or not, in taking into consideration the remuneration received, they must have regard to the remuneration which the invention has brought in to the Patentee, or the person who claims the right of the Patentee, whether it be in one Country or another.

Their Lordships, therefore, are of opinion, that they cannot in this case recommend Her Majesty to extend the term of this Patent.

Mr. *Archibald* called their Lordships' attention to the frame of the petition, and to the inconvenience, in consequence of the petition not fully stating the facts in respect to the Foreign

(1) Law Rep. 3 P. C. 295. (2) 4 Moore's P. C. Cases (N.S.) 452.

patents, merely referring to them, and of the necessity of a rule being laid down that a clear statement should be made in the petition in applications of this nature.

THE LORD JUSTICE JAMES:—

Their Lordships entirely concur in that view, and are obliged to you for drawing their attention to it. They think it very desirable that in petitions of this nature every matter applicable to the Patent should be stated.

Upon the application for costs of the Opponents,

THE LORD JUSTICE JAMES:—

Their Lordships are of opinion, that in this case, with regard to costs, they will follow the rule applied in *Hill's Patent* (1)—a case in which their Lordships directed that a lump sum for costs should be divided among the Opponents, to save the expense and the delay of a formal taxation; and their Lordships direct that the sum of £500 be distributed amongst the Opponents for costs.

Solicitor for the Petitioners: *J. Henry Johnson.*
Solicitors for the Opponents: *Shaen, Roscoe, & Massey.*
Solicitors to the Treasury, for the Crown.

(1) 1 Moore's P. C. Cases (N.S.) 271.

J. C.*
1871
Dec. 4.

In re PITMAN'S PATENT.

Communication by Foreign Patentee and Inventor—English Patent founded thereon—Application by Assignee for prolongation—Omission of proper averments in petition.

Pat 536

As the recommendation to the Crown for the prolongation of the term of Letters Patent is a matter of discretion in the Judicial Committee, it is imperatively necessary that the petition for such prolongation should state fairly and fully everything relating to the Patent: an omission to do so is fatal to the application.

Where the Petition omitted to state that the Patent was, in fact, a communication from a Foreigner living abroad, who had previously to the English Patent patented the same invention in *America*, and that the American Patent had expired, though afterwards renewed in *America*, the Judicial Committee, in the circumstances, refused the application.

THIS was an application by *Cowles*, the Assignee of the Patentee, *Pitman*, for an extension of the term of Letters Patent, dated the 6th of October, 1857, for an invention of "Improvements in the apparatus for making Candles and other analogous manufactures, a communication from abroad." The petition set forth, that *Pitman* was the true and first Inventor in *England*, and described the nature of the invention, which was of great merit; that the Petitioner was a practical Candle manufacturer of long experience, who came over from *America* for the purpose of bringing the invention into practical operation in this Country and had experienced great difficulties and considerable opposition from Candle Manufacturers and workpeople, who objected to the substitution of machinery for handwork; that the Letters Patent had been assigned by *Pitman* to one *Stainthorpe* and another, and afterwards sold by them, with another Patent, to the Petitioner, in trust for himself and others, for the sum of £400; to the extent of an interest of one fifth share for himself and four fifths shares for the benefit of the other parties; that, owing to the difficulties met with and expenses incurred by the Petitioner in his exertions to bring the invention into general use, he had not received any adequate remuneration for the labour, time, and capital he had

* *Present*:—Sir James William Colvile, Sir Montague Edward Smith, and Sir Robert Porrett Collier.

expended; and he prayed for an extension of the term of seven years.

Sir *John Karslake*, Q.C. (with whom was Mr. *Aston*), for the Petitioner:—

From his opening address, it appeared that the Patent was a Foreign invention for which Letters Patent had been granted in *America* previous to the English Patent, and that the American Patent had expired, but was said to have been afterwards renewed for seven years, and that such extended term would expire on the 6th of August, 1876; which facts were not stated in the petition. It was submitted that an Assignee of a Patentee could apply for an extension: *In re Morgan's Patent* (1); *In re Russell's Patent* (2); and Statute, 7 & 8 Vict. c. 69, s. 4.

Mr. *Archibald*, for the Crown, interposed:—

There are two radical objections to the hearing of this application for a prolongation of the Patent. First, it is submitted, that this Tribunal has no power to prolong the terms of the Patent in the circumstances disclosed in this application. The Patentee was not the original Inventor. The English Patent was founded on a communication from a Foreigner living abroad, who had previously taken out in *America* a Patent for this very same invention, which is now subsisting: *In re Normand's Patent* (3). Secondly: No statement or averment appears in the petition of the material fact of the Patent being a Foreign one, patented in the first instance in *America*, and communicated to the Patentee in *England*. [SIR MONTAGUE E. SMITH:—The petition would lead the Court to suppose that the American Patent was taken out after the English Patent.] The omission to state the true facts in the petition is fatal: *In re Clark's Patent* (4); *In re Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*) (5).

SIR JAMES W. COLVILE:—

In this case a preliminary objection has been taken on the part of the Crown to the further hearing of this application, on the

(1) 1 Web. Pat. Rep. 738.
(2) 2 Moore's P. C. Cases, 496.
(3) Law Rep. 3 P. C. 193.
(4) Ibid. 426.
(5) *Ante*, p. 75.

J. C. 1871

In re PITMAN'S PATENT.

ground that the petition does not state those facts which it was material to state, touching the existence or supposed existence of the Foreign Patent. Their Lordships have to observe that this is certainly not a new objection—that a similar omission was brought to the attention of the Court in the case of *Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*) (1), and although the decision in that case did not turn upon that point, as a decision adverse to the application had there been pronounced upon other points, yet the Lord Justice *James*, who was speaking in the name of their Lordships, stated, that they entirely concurred in the view there stated, that they were obliged to Mr. *Archibald* for drawing their attention to it, and that the Committee thought it very desirable that Petitions of this nature should state everything belonging to the Patent fairly and fully. No doubt their Lordships did not lay down any rule to the effect that a Petition which failed in that respect should, therefore, be dismissed; but, so far as it went, it laid down that it was only the application of the general rule which has always prevailed here, and which is particularly mentioned in *In re Clark's Patent* (2), that "a Petitioner seeking the grace and favour of the Crown is bound to strict truth and to the utmost candour and frankness, to *uberrima fides*, in his statement."

In the present case, it appears to their Lordships, that there were peculiar reasons why the circumstances relating to the American Patent should appear upon the face of the Petition. The Patent, in fact, had expired. It is said it has been renewed. It is desirable that those who come to oppose the Patent should know the precise circumstances and the possible conditions upon which that renewal was granted, and, therefore, it does appear to their Lordships that this was eminently a case in which the suggestions of Mr. *Archibald*, in *In re Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*), approved by their Lordships, should have been followed, and that there should have been a full disclosure of all the circumstances relating to the American Patent. Their Lordships wish it to be understood, that for the future this Committee will invariably act upon that principle. If they had any doubt upon this case they would have been unwilling to decide it adverse to the Petitioner upon that point, because, as Mr. *Aston* observed,

(1) *Ante*, p. 75. (2) Law Rep. 3 P. C. 426.

the particular application of the general rule may not have been known to the profession at large, but their Lordships, after considering the opening statement and the Petition, have clearly come to the conclusion that it would be impossible to support this application upon its merits.

The general object of the statutable jurisdiction of this Committee, in respect to advising an extension of the terms of the Letters Patent, it is hardly necessary to state, is the reward to the Inventor, in cases where there has been extraordinary merit in the invention, but where, from circumstances, he has failed to reap any adequate remuneration for his invention during the currency of the term of the Letters Patent. There are, no doubt, cases in which their Lordships have granted applications by the Assignees of the Patentee for extension of the term, and have also considered, in some respects, the expenses incurred by the Assignee in bringing the Patent into notice, and for the merit, as it may be said, of the Assignee in patronizing the Patentee, and in pushing the Patent into notice; but the general rule which their Lordships entertain in applications on the part of Assignees, is, as was stated by Lord *Brougham* in *Morgan's Patent* (1), that by so doing, "they are, though not directly, yet mediately, and consequentially, as it were, giving a benefit to the Inventor, because if the Assignee is not remunerated at all, it might be said that the chance of the Patentee of making an advantageous conveyance to the Assignee would be materially diminished, and consequently, his interest damnified. For this reason, consideration has been given to the claims of the Assignee who has an interest in the Patent." It has been the practice of this Tribunal in cases in which an application of this kind on the part of an Assignee has been granted to impose conditions, whereby a proportion, at least, of the benefits to be derived from the Patent should go to the original Inventor: *In re Russell's Patent* (2).

In this case, however, their Lordships find that the original Patentee is now entirely, as it were, out of the case. The English Patentee, *Pitman*, was merely a person to whom the invention claimed for had been communicated by the American Patentee; he took out the Patent here, he found that he could not profitably

(1) 1 Web. Pat. Rep. 738. (2) 2 Moore's P. C. Cases, 496.

J. C. 1871 *In re* PITMAN'S PATENT.

work it—he seems to have assigned it back to Mr. *Stainsthorpe*, the original and foreign Inventor, and to another person, and they again assigned it for the small sum of £400, in 1864, to certain persons, of whom the present Applicant is one; and, as it is stated, wholly for the benefit of himself. It further appears that since that assignment, which really was more in the nature of a commercial speculation than anything else, they have made a profit of nearly £3,000. In the case of *Morgan's Patent*, to which we have already alluded, Lord *Brougham* said, "It appears, therefore, to their Lordships, in considering whether any additional term should be granted to them, that this amount they have made, is a very reasonable amount for anything they have a right to expect. So much, then, as to the claim of the Assignees mediately to the interest of the Patentee," and their Lordships came to the conclusion that if they were to listen to such considerations as were put forward, the renewal of a Patent would become a mere matter of commercial speculation, and that it would be almost impossible, in any case, to refuse such renewal.

Their Lordships, acting upon and adopting very much the reasons of their Lordships in the recent case of *Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*) which, in some respects, very closely resembles this case; come to the conclusion, that upon the opening statement no ground whatever has been made on which they ought to recommend to Her Majesty to prolong this Patent, and they must accordingly refuse the application.

Solicitors for the Petitioner: *Woodbridge & Sons.*
Solicitors to the Treasury, for the Crown.

In re WIELD'S PATENT.

J. C.*
1871
Dec. 5, 6, 7.

Letters Patent—Prolongation—Accounts—Practice—Costs.

Accounts of profits and loss filed by a Patentee on his application for a prolongation of the term of Letters Patent being *primâ facie* unsatisfactory the Judicial Committee directed the question of accounts to be taken before considering the merits of the invention.

As the accounts were not satisfactorily explained, the application for a prolongation was refused.

Considerations which induce the Judicial Committee to give costs to *bonâ fide* Opponents.

THE Patentee petitioned for an extension of the term of Letters Patent granted to him for an invention "of improvements in machinery for winding yarn or thread on to bobbins and spools, card, and other similar surfaces."

Caveats were entered and grounds of objections filed, which, in substance, were, that the invention was not an original one, and also that the Patentee had received a sufficient amount of remuneration for his invention. The Petitioner filed a statement of accounts of the profits and loss of the Patent. The nature and particulars of the accounts are stated in their Lordships' judgment.

The *Solicitor-General* (Mr. *Jessel*, Q.C.), Mr. *Field*, Q.C., and Mr. *Aston*, for the Petitioner.

Sir *R. Palmer*, Q.C., and Mr. *Carpmael*, for one set of Opponents.

Sir *John Karslake*, Q.C., and Mr. *Macrory*, for another Opponent, and

Mr. *Archibald*, for the Crown.

After the petition had been opened,

Sir *R. Palmer*, Q.C., and Sir *J. Karslake*, Q.C., for the Opponents, and Mr. *Archibald*, for the Crown, submitted that the accounts put in by the Petitioner were *primâ facie* so unsatisfactory, that it was a case in which the Court would, in the first instance,

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

J.C. 1871 — *In re* WIELD'S PATENT.

investigate the accounts of the profits and loss filed by the Patentee before entering on the merits of the invention: citing *In re Saxby's Patent* (1); *In re Clark's Patent* (2); *In re Houghton's Patent* (3).

Their Lordships assented to this course, intimating their opinion, that it was essential and necessary to ascertain clearly the amount of remuneration the Patentee had received from the Patent, and the Petitioner's Son, and Bookkeeper, was examined as to the amount of the profits on the Machines; it appeared that no Cash Book had been kept, and the Witness was unable to explain the accounts in a satisfactory manner. The Petitioner, from ill-health, was not in attendance, and there was no other Witness to verify the accounts.

SIR JAMES W. COLVILE:—

Their Lordships think that it is clearly necessary to have these accounts verified in some way or other.

It is unfortunate, in consequence of Mr. *Wield's* infirmity, that he should be unable to attend here to speak from his own personal knowledge to the items in the accounts, but their Lordships are bound to say, that so far as the inquiry has already gone, it seems to them that it would be almost impossible, from what has been shewn, to say that the accounts are such as to afford their Lordships that clear and satisfactory proof that the Patentee has not received adequate remuneration for his invention which the practice of this Tribunal requires.

They merely mention this in order that it may not be thought it is in consequence of the defective evidence, or rather the misfortune of the Petitioner in not being able to produce further evidence, that their decision proceeds. With that intimation it may perhaps be as well to consider whether it is worth while to keep up this contest any longer.

The petition was then abandoned.

SIR JAMES W. COLVILE:—

Many of the items of the accounts really cannot be supported as fairly chargeable against the Patent. There is a question as to

(1) Law Rep. 3 P. C. 292. (2) Law Rep. 3 P. C. 421.
(3) Law Rep. 5 P. C. 461.

the payment of £5,000, and a further payment of £1,000, for the Patent, and it is a question with their Lordships, whether such payments were not rather capital invested in the manufactory which ought not to enter into those items; then there is a further sum which was paid when the Patent was sold, and thought to be of very little value—it was bought back and considered to be of increased value, and that would be a mere commercial speculation, and, therefore, their Lordships would not be justified in allowing that item in the account as one of loss. There are also other items—for instance, the item of Mr. *Wield's* personal allowances—which are carried into the account, after it has been admitted in evidence that he was incapable of conducting the business or giving any active superintendence thereof; taking it, as was observed by Lord *Cairns*, in *In re Saxby's Patent* (1), that the items were transferred from one side of the account to the other, it would really appear that the remuneration amounted to no inconsiderable sum.

Their Lordships know enough of the invention to be able to say, that it is not one of those very striking inventions, although it may be a very meritorious one, like some which their Lordships have had before them on other occasions. It is very ingenious, but it is an invention just taking advantage of the combination of several well-known mechanical appliances to carry out an ordinary process, which no doubt is a very successful one, but it is founded upon an earlier invention, in some respects at least, and it appears from the opening statement of the Petitioner's counsel and the papers before us, that the first Patent was not very much worked; but then there was a further one which gave it an improved value. It appears to have been a step in advance over that which had been previously done, and if the Patent expires other persons will be enabled to take a still further step in advance, whereas if it is extended the exercise of their inventive faculties will be checked.

No doubt there may be cases in which a Patentee might succeed in successfully satisfying their Lordships that there ought nevertheless to be a further extension of the term of the Patent. It has been laid down, that it is not a question of law, and it is always necessary to satisfy their Lordships that there has not

(1) Law Rep. 3 P. C. 298.

J. C. 1871 *In re* WIELD'S PATENT.

been anything like, from circumstances over which a man might have no control, sufficient remuneration for his patent; it is necessary that the Patentee should satisfy their Lordships that that has not been the case. On the contrary, this case comes before their Lordships in such a state that they really cannot form any very correct idea as to what the amount of remuneration has been; but so far as they can form such opinion they would be inclined to say, that there has been sufficient remuneration.

The Opponents applied for costs.

SIR JAMES W. COLVILE:—

Their Lordships have considered the question of costs, and they are inclined to adhere to the rule that has been laid down, almost from the first application under the Act giving them jurisdiction in patent cases, that in the exercise of their power to grant costs it is certainly not desirable to refuse the costs of a fair opposition, since it is rather in the interest of this Tribunal to encourage *bonâ fide* oppositions, in order that the Court may be put into possession of all that can be alleged against the continuance of the patent.

In an early case, *In re Westrupp* and *Gibbins' Patent* (1), Lord *Lyndhurst* expresses his opinion in these terms:—"My opinion on the subject of costs is this: if a party entitled to oppose does come and oppose, and opposes successfully, if we do not give costs we shall discourage persons coming to protect the interests of the public. We have the power to give costs in any matter referred to us, and sitting here as a Judicial Committee, we can give costs under the general Act, not the Patent Act." It is obvious that those who come to protect the interest of the public have better means of stating the objections to the continuance of the patent than the Officers of the Crown, whatever their experience and ability may be.

Their Lordships have come to the conclusion that as two sets of Opponents really represent the same kind of opposition, it will not be desirable to allow more than one set of costs; they, therefore, propose to follow the course that was recently taken by

(1) 1 Web. Pat. Cases, 556.

J. C.
1871
In re WIELD'S PATENT.

the Lord Justice *James* in *In re Johnson's Patent (Willcox & Gibbs' Sewing Machine)* (1), and, as in that case, to order that the Petitioner should pay £500 to be apportioned between the two classes of Opponents, unless he should prefer within a week to tax the costs of all parties.

The Petitioner elected to have the costs taxed.

Solicitors for the Petitioner: *Milne, Riddle, & Mellor.*

Solicitors for the Opponents: *Gregory & Co.; Paterson & Co.;* and *Wilson, Bristow, & Co.*

Solicitors to the Treasury, for the Crown.

In re WINAN'S PATENT.

J. C.*
1872
Jan. 11.

Letters Patent—Statute, 15 & 16 *Vict. c.* 83, *s.* 25—*Construction—Patent first taken out in England—French Patent for same invention expired—Prolongation.*

Upon the construction of sect. 25 of 15 & 16 Vict. c. 83 :—*Held,* that that section does not apply where an English Patent is taken out in this Country before a Patent for the same invention is obtained in a Foreign Country.

A Patent by American subjects was taken out in this Country, and shortly afterwards in *America* and *France* for the same invention. After the expiration of the French Patent, and within a few months of the expiration of the American Patent, application was made for a prolongation of the English Patent. Such application refused, as the Judicial Committee would not, on the ground of general policy, recommend a renewal of the English Patent after the French Patent had been allowed to expire.

THIS was an application by the Petitioners, *Ross Winans* and *Thomas Winans,* Citizens of the *United States of America,* for an extension of the term of Letters Patent granted to them in June,

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

(1) *Ante,* p. 75.

J. C. 1872

In re WINAN'S PATENT.

1858, for an invention of a "new and useful improvement in the form of Hulls of Steam Vessels."

Mr. *Webster*, Q.C., Mr. *Aston*, Mr. *Benjamin*, and Mr. *Nasmith*, for the Petitioners, and

Mr. *Archibald*, for the Crown.

It appeared upon the opening statement, that the same invention was patented in *France* in the month of August in the same year the English Patent was granted, and that the French Patent had expired, also that in October in that year the Patentee had taken out a Patent in *America* for the same invention, and that the American Patent had but a few months to run.

Mr. *Archibald*, for the Crown, took a preliminary objection to the application:—

This is an invention by an Alien, and I submit, that under sect. 25 of the Statute, 15 & 16 Vict. c. 83, as the French Patent has expired, there is no jurisdiction in this Tribunal to extend the term: *In re Poole's Patent* (1); *In re Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*) (2).

[SIR ROBERT PHILLIMORE:—*In re Bett's Patent* (3) their Lordships held that the earlier part of the 25th section clearly applied only to cases where Patents had been granted in Foreign Countries before the grant of the Patent in the *United Kingdom*, and that the words in the proviso to that section, "any such Patent or like privilege," must be taken to refer to the entire description of the Patent mentioned in the foregoing part of the section.]

Mr. *Archibald*:—Admitting that to be the true construction of the section, then I contend that, according to the practice of the Judicial Committee in applications for prolongation of Letters Patent, this application will not, on public grounds, be entertained, as first, the French Patent has expired, and Ships could be built in *France* to the detriment of the interests of English Shipbuilders; and, secondly, that an extension of the term ought not to be granted on the mere speculation that the American Patent might be pro-

(1) Law Rep. 1 P. C. 514. (2) *Ante*, p. 75.
(3) 1 Moore's P. C. Cases (N.S.) 49.

longed: *In re Normand's Patent* (1), which is on all fours with the present case.

Mr. *Webster*:—

This case materially differs from *Poole's Patent* (2), as in that case there was a prior Foreign Patent. In *In re Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*) (3) the decision really turned upon the accounts. A Foreigner can take out Letters Patent here, and if first taken out in this Country, *England* becomes its domicile of origin, which fact takes the case out of the operation of the 25th section of the Statute, 15 & 16 Vict. c. 83.

SIR ROBERT COLLIER:—

In this case the material facts are shortly these. A Patent was taken out in June, 1858, and contemporaneously with that Patent a Patent was taken out in *France* for the same invention. Although the application for the French Patent was later, we are told it was dated the same day as the English; and a few months after, namely, in October, 1858, a Patent, also for the same invention, was taken out in *America*. The French Patent has been suffered by the Patentees to expire, the American Patent will shortly expire, and, of course, it is questionable whether or not it will be renewed.

Their Lordships have first to consider, whether the objection raised on the part of the Crown to their jurisdiction is maintainable, and for the reasons which they have intimated in the course of the argument they think that objection is not maintainable. They are of opinion, that the proviso in the 25th section of the Statute, 15 & 16 Vict. c. 83, must receive the interpretation that was put on it by this Tribunal in *Betts' Patent* (4), namely, that it only applied to the case where a Foreign Patent was taken out before the English Patent. That is not the case in the present application, and, therefore, their Lordships deem that their jurisdiction to extend this Patent is not ousted by that section.

But then their Lordships have to consider the principles on which that jurisdiction should be exercised, which is, in fact, a question of general policy, and will, therefore, refer to the grounds

(1) Law Rep. 3 P. C. 193.
(2) Law Rep. 1 P. C. 514.
(3) *Ante*, p. 75.
(4) 1 Moore's P. C. Cases (N.S.) 49.

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which regulate this Committee, stated by Sir *John Coleridge*, in the very well-considered judgment delivered by him in *Hill's Patent* (1). He uses expressions, some of which are quoted in *Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*) (2). He says: "A monopoly limited to a certain time is properly the reward which the law assigns to the Patentee for the invention and disclosure to the public of his mode of proceeding. Whether that term shall be extended, in effect, whether a second patent shall be granted for the same consideration, and the enjoyment by the public of its vested right be postponed, is to depend on the exercise of a discretion, judicial indeed, yet to be influenced by every such circumstance as would properly weigh on a sensible and considerate person in determining whether an extraordinary privilege, not of strict right, but rather of equitable reward, should be conferred;" and in that case, although the circumstances were by no means exactly parallel with this, their Lordships held, that although they were not prevented by the operation of this 25th section from entertaining the application, still, on grounds of general policy, they thought fit to refuse it.

There was another case, heard in 1862, *In re Newton's Patent* (3), which is more in point, and in fact has a strong bearing upon the present application. Dr. *Lushington*, in pronouncing the judgment of their Lordships, says (4): "This is a petition for the prolongation of a Patent granted in August, 1848, for the term of fourteen years. It appears that about the same time when the Patent was granted here, a similar application was made in the *United States of America*; and that in consequence of that application, Letters Patent were granted on the 19th of September, 1848, for the same period, namely, fourteen years," making the case very similar to the present case, in which Letters Patent were obtained here in June, and in *America* in October: there they were obtained in *England* in August, and in *America* in September." His Lordship proceeded: "An application is now made on behalf of the Patentee, or his Assignees, praying their Lordships to renew this Patent. Now, their Lordships have considered the cases bearing upon this point which have been previously decided by the Judicial Committee, and they are of

(1) 1 Moore's P. C. Cases (N.S.) 264.
(2) *Ante*, p. 78.
(3) 15 Moore's P. C. Cases, 176.
(4) Ibid. 179.

opinion, that those cases were all rightly decided, and they have no intention of departing from the principles there laid down. It appears, however, to their Lordships, that the decision of this case rests upon a very narrow principle indeed. The Patents in *England* and the *United States of America* were granted almost simultaneously, and though this case does not come within the letter of the Statute, it appears to their Lordships to come within the true spirit of it; and their Lordships are of opinion, that in the circumstances they, in exercise of their discretion, ought not to advise Her Majesty to grant a prolongation of the Patent." That case certainly bears a very strong resemblance to the present.

There was also another case referred to, that of *Normand's Patent* (1), where, no doubt, the circumstances were in many respects different from the present case, but in which Lord Justice *Giffard* observes, that "their Lordships cannot recommend Her Majesty to prolong the Patent in *England* upon the mere chance of its being prolonged in a Foreign Country" (2).

And there is another case, *Johnson's Patent* (*Willcox & Gibbs' Sewing Machine*) (3), which, no doubt, differs in many particulars from the present, but in which the general principles laid down in the case before referred to are confirmed.

In the present case, as already observed, we have circumstances very similar to those which existed in *Newton's Patent* (4), but we have this additional fact, which appears to their Lordships very material: not only, as in *Newton's Patent*, were Patents taken out in this Country and *America* within short periods of each other, so that the American Patent, as well as the English, were nearly expired; but in this case a Patent was taken out in *France*, and that Patent has been allowed to expire by the Patentees themselves. So that what their Lordships are asked now to do is this: the Patentees having published this invention in *France*, but not having kept up their Patent in that Country, we are asked to prohibit the subjects of the Queen, for a certain term, if a prolongation is granted, from building Vessels the subject of this invention; while the building of them would be open to Shipbuilders in *France*, where the invention has been published by the Patentees.

(1) Law Rep. 3 P. C. 193.
(2) Ibid. 195.
(3) *Ante*, p. 75.
(4) 15 Moore's P. C. Cases, 176.

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Under these circumstances their Lordships, having regard to the principles which have been laid down in the cases I referred to, are of opinion, that it is not their duty to advise the Crown to prolong this Patent.

Solicitor for the Petitioners: *A. L. Newton.*
Solicitors to the Treasury, for the Crown.

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THE HONOURABLE ROBERT JONES . . APPELLANT;

AND

THE STANSTEAD, SHEFFORD, AND CHAMBLY RAILROAD COMPANY } . . RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (APPEAL SIDE) FOR LOWER CANADA.

Law of Lower Canada—Railway Act, 14 & 15 *Vict.* c. 51—*Consolidated Statutes of Canada*, 22 *Vict.* c. 66—*Railway Company—Notice—Condition precedent—Compensation for rights injuriously affected—Action en dénonciation de nouvel œuvre.*

A Railway Company, in *Lower Canada*, constituted by Act of the Provincial Legislature, incorporating the *Provincial General Railway Act*, 14 & 15 Vict. c. 51 (Consolidated Statutes of *Canada*, 22 Vict. c. 66), made under their Act a Railway Bridge, without giving notice to treat for compensation to the Owner of a Bridge having certain statutory rights to tolls, by virtue of a special Act, which rights he alleged were interfered with by the Railway Bridge. The Owner brought an action, *en dénonciation de nouvel œuvre*, for demolition of the Railway Bridge, and damages occasioned by its erection and use. The Railway Company pleaded, *inter alia*, the Acts of the Legislature empowering them to make their Railway, and that the Railway Bridge was within the true meaning of those Acts, and was not in violation of the Appellant's statutory rights:—

Held, by the Judicial Committee, that assuming the Plaintiff, by virtue of his special Act, to be entitled to compensation, yet his action failed, inasmuch as the giving notice to treat for compensation was not a condition precedent to the Company's right to exercise their powers, and, therefore, that the Company were not wrongdoers.

THE questions at issue in this appeal were, whether the Appellant had such a right in a Toll-bridge, erected by him over the River

* *Present*:—SIR JAMES COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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Richelieu, in *Lower Canada*, as to support an action brought by him against the Respondents, seeking to demolish a Railway Bridge, forming an integral part of their line of Railway, constructed by that company over the same River after the erection of the Toll-bridge, and whether the Respondents were liable for damages, on the ground of the construction of the Railway Bridge being a disturbance of the Appellant's right.

The rights of the parties depended upon the construction of Acts of the Provincial Parliament of *Lower Canada*.

In the year 1826, the 6 Geo. 4, c. 29, was passed by the Parliament of the Province of *Lower Canada*, authorizing the Appellant to erect a good and substantial drawbridge over the River *Richelieu*, at the Town of *St. John's*, at a point specified in the Act, the draw-gate of which, for the passage of the Vessels, or Boats, or rafts, was to be at least thirty feet in the clear between the pillars, with one Toll-house and turnpike, and other dependencies, on or near the Bridge, and vesting the Bridge, the Toll-house, turnpike, and dependencies, and ascents and approaches to the Bridge, in the Appellant, his heirs and assigns, for ever. The Act contained certain requisites regarding the site and elevation of the Bridge, and declared that the Appellant, in order to entitle himself to the benefits and advantages granted to him by the Act, should erect and complete the Bridge and dependencies within four years of the day of the passing of the Act, and should give certain notices and comply with certain formalities mentioned in the Act; and authorized the Appellant, so soon as the Bridge should be erected and certified to be fit and proper for the passage of Travellers, cattle, and carriages, and the certificate published in the manner directed, to take Tolls for pontage at certain specified rates.

The 10th section of the Act was as follows:—"As soon as the said Bridge shall be passable and opened for the use of the public, no person or persons shall erect or cause to be erected any Bridge or Bridges, or works, or use any ferry for the carriage of any persons, cattle, or carriage whatsoever for hire, across the said River *Richelieu*, within one-half league below, and one league above the said Bridge; and if any person or persons shall erect a Toll-bridge or Toll-bridges over the said river within the said limits, he or they shall pay to the said *Robert Jones*, his heirs, executors, curators,

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and assigns, treble the Tolls hereby by this Act imposed for the persons, cattle, and carriages which shall pass over such Bridge or Bridges; and if any person or persons shall at any time for hire or gain pass or convey any person or persons, cattle or carriages, across the said River, within the limits aforesaid, such offender or offenders shall, for each carriage, or person, or animal so carried across, forfeit and pay a sum not exceeding forty shillings currency."

It was further enacted, that the Act should not, nor should any of the provisions therein contained, extend to weaken, diminish, or extinguish the rights and privileges of His Majesty, His heirs and successors (except as to the power and authority thereby given to the Appellant, his heirs and assigns, and except as to the rights thereby expressly altered and extinguished), and that His Majesty, his heirs and successors, should have and exercise the same rights, with the exceptions aforesaid, as they would each of them have had before the passing of that Act, to every effect and purpose whatsoever, and in as ample a manner as if the Act had never been passed.

After the passing of this Act the Appellant erected a Bridge over the River *Richelieu*, at the Town of *St. John's*, which was opened in 1827.

In the year 1853, the *Stanstead, Shefford, and Chambley Railroad Company* was incorporated by a Statute of the Province of *Canada* (16 Vict. c. 107), and was by that Act authorized to construct a Railroad from such point on the *St. Lawrence River*, opposite the City of *Montreal*, as the Directors of the Company should think fit, in the general direction of *Chambly* and *Shefford* to the outlet of *Memphramagog Lake*, and thence to the Province line at *Stanstead* to form a connection with the *Passumpsic and Connecticut Rivers Railroad.*

The 14 & 15 Vict. c. 51, the *Railway Clauses Consolidation Act of Canada*, which regulates the privileges of Companies who are authorized to construct Railways in *Lower Canada*, was then in force. Certain clauses of this Act, intituled "*Acte pour refondre et régler les clauses générales relatifs aux chemins de fer*," were incorporated in the above Act, 16 Vict. c. 107, the material sections were as follows:—

Sect. 4 declares, that the power given by the special Act of

constructing the Railway or taking lands for that purpose should be exercised conformably to the dispositions and restrictions contained in that present Act, and compensation should be made to the Owners and Occupiers of the lands taken by the Railway or injuriously affected by its construction, as well as to other persons interested, for the value of the said lands, or the damages suffered by reason of the power as to those lands, or the powers given to the Company by that Act, or by the Special Act, or any Act incorporated with it. Unless otherwise specially provided by that Act or the Special Act the amount of such compensation should be ascertained and determined in the manner provided by the Act.

By sect. 7, sub-sect. 6, it is declared, "The word 'lands' shall include all real estate, messuages, lands, tenements, and hereditaments of any tenure." "*Le mot 'terrains,' comprendra tous les biens-fonds, propriétés foncières, tous tènements et héritages quelconques quelqu'en soit la teneur.*"

Sect. 9 provided, that "The Company shall have power and authority:—secondly, to purchase, hold, and take of any corporation or person any land or other property necessary for the construction, maintenance, accommodation, and use of the Railway, and also to alienate, sell, or dispose of the same at pleasure. Thirdly, to take, use, occupy, or hold, but not alienate (otherwise than by using) the public beach, or the land covered with the waters of any River or Lake of this Province which may be necessary for the Railway without causing damage to the said beach or lands, and without obstructing the navigation of the said Rivers or Lake: Provided that leases shall be only for so long as the beach or land are necessary for the use of the Railway. Fifthly, to construct, maintain, and use the Railway across, along, or on any River, Watercourse, Canal, Road, or Railway which it may cross or touch; but the River, Watercourse, Road, Canal, or Railways so crossed shall be restored by the Company to its original condition, or to a condition involving no unnecessary diminution of its utility."

Sect. 10 directs that plans and surveys should be made and corrected as follows:—"Surveys and levels shall be taken and made of the lands through which the Railway is to pass, together with a Map or plan thereof, and of its course and direction, and of the lands intended to be passed over and taken therefor, so far as then ascer-

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tained, and also a Book of reference for the Railway; in which shall be set forth a general description of the said lands, the names of the Owners and Occupiers thereof so far as they can be ascertained, and everything necessary for the right understanding of such Map or plan. The Map or plan and Book of reference to be examined and certified by the person performing the duties formerly assigned to the Surveyor-General or his Deputies, who should deposit copies thereof in the Office of the Clerks of the Peace in the Districts or Counties through which the Railway passes, and also in the Office of the provincial Secretary, and should also deliver one copy thereof to the said Company.

"Sect. 11. The conveyance of lands, their valuation, and the compensation therefor, shall be subject to the following rules:—

"Fifthly. After one month from the deposit of the Map or plan and Book of reference, and from notice thereof in at least one Newspaper in each of the Districts or Counties through which the Railway is intended to pass, application may be made to the Owners of lands, or to parties empowered to convey lands, or interested in lands, which may suffer damage from the taking of materials or the exercise of any of the powers granted for the Railway, and thereupon agreements and contracts may be made with such parties touching the said lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained, as may seem expedient to both parties, and in case of disagreement between them or any of them, then all questions which arise between them shall be settled as follows, that is to say:—

"Sixthly. The deposit of a Map or plan and Book of reference and the notice of such deposit shall be deemed a general notice to all such parties as aforesaid of the lands which will be required for the said Railway and works.

"Seventhly. The notice served upon the party shall contain a description of the lands to be taken or of the powers intended to be exercised with regard to any lands, describing them; a declaration of readiness to pay some certain sum or rent, as the case may be, as compensation for such lands, or for such damages, and the name of a person to be appointed as Arbitrator of the Company if their offer be not accepted; and such notice shall be accompanied

by the certificate of a sworn Surveyor for *Upper Canada* or *Lower Canada*, as the case may be, disinterested in the matter, and not being the Arbitrator named in the notice, that the land, if the notice relate to the taking of land, shewn on the said Map or plan is required for the Railway, or is within the limits of deviation hereby allowed, that he knows the land or the amount of damage likely to arise from the exercise of the powers, and that the sum so offered is, in his opinion, a fair compensation for the land and for the damages as aforesaid."

In sect. 22 it was declared that "Nothing herein contained shall derogate from, or shall be interpreted to derogate in any way from, the rights of Her Majesty, Her heirs or successors, or of any person, or of any Corporation or collegiate body, such only excepted as are herein mentioned."

In 1855, an Act was passed by the Parliament of the Province of *Canada*, 18 Vict. c. 185, to amend the Act incorporating the *Stanstead, Shefford, and Chambly Railroad Company*, by which Act, amongst other things, the Company were authorized to make and construct a branch line of Railway from some point on their main line to any point on the *Champlain and St. Lawrence Railway*, and all the provisions and enactments of the Act of Incorporation were made to apply to the branch lines and extensions authorized by the amending Act, and it was enacted, that the Company should have and exercise all the powers, authority, and privileges in respect to the branch lines as were by the original Act conferred upon the Company in respect of the main line, as fully and completely as if the branch lines had formed part of the line mentioned in the Act of Incorporation.

In 1858, a further Act, 22 Vict. c. 57, to amend the Acts relating to the *Stanstead, Shefford, and Chambly Railroad Company*, was passed, by the 2nd section of which it was enacted, that notwithstanding anything in any other Act contained, the branch line, from the main line to *St. John's* on the *Champlain and St. Lawrence Railway*, then in course of construction, should be held and considered for all purposes whatsoever to be part of the main line of the *Stanstead, Shefford, and Chambly Railroad.*

The Appellant having discovered that the Company were making preparations to construct a Bridge over the River *Richelieu* within

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the limits prohibited by the Act which authorized him to construct his Bridge, caused a formal notice of his rights, and a protest against the Company's works being proceeded with, to be served on the 21st of August, 1858, by two Notaries public at the office of the Company at *Waterloo*, in the Township of *Shefford*, and on the 30th of August a similar protest on the Appellant's behalf was served on the Contractors and Builder of the Bridge in the Town of *St. John's*.

Notwithstanding the Appellant's protest the Railway Company completed their Bridge, and ran trains over it, carrying passengers and goods.

In the month of August, 1859, the action out of which the present appeal arose was commenced in the Superior Court of *Lower Canada*, District of *Iberville*, by the Appellant, against the Respondents, described as a body politic, and incorporated according to the Laws of the Province. The declaration stated, in substance, to the effect hereinbefore detailed, and that the Appellant had suffered and continued to suffer considerable loss by reason of the Respondents having erected and opened their Bridge, and concluded by praying that by reason of the erection by him of a Bridge across the River *Richelieu* at the Town of *Dorchester*, now called *St. John's*, according to the Act, 6 Geo. 4, c. 29, he should be declared to have acquired an exclusive privilege to the Ferry of any person, cattle, or carriage whatever, for hire or gain across the River *Richelieu* within the limits of half a league below and one league above the Bridge; that the Bridge erected by the Respondents across the River *Richelieu* was a work and construction which the Company had no right to make, and that the Company should be consequently ordered to undo and demolish, or to cause to be demolished, the Bridge so constructed within fifteen days after the service of the judgment to be rendered, or within such time as the Court might fix; that the Company be forbidden to disturb the Plaintiff in the enjoyment of his privilege within the limits above-mentioned, and that in default of the Company complying with the judgment within such time as aforesaid the Plaintiff should be at liberty to cause to be demolished, with and under the authority of the Court, at the costs and charges of the Company, the Bridge constructed by the Company across

the River *Richelieu*, and that the Company be condemned to pay to the Plaintiff £5,000 damages, with interest and costs.

Exhibits were filed by the Appellant with the declaration, comprising the certificate of two Justices of the completion of the Appellant's bridge, the notice thereof published in the *Montreal Gazette*, the protest served on behalf of the Appellant on the Respondents, and the notice given of his special Act of 1826, as required by that Act, that the inhabitants, if they chose to do so, might apply for authority to build the Bridge themselves.

The plea of the Respondents, after reciting the conditions under which the Appellant was empowered to construct his Bridge, pleaded, in substance, that the Bridge built by the Appellant was not of the construction and dimensions required by the Act, and was not such a Bridge as to entitle the Appellant to the benefits and advantages of the Act, and that the Plaintiff had not given the notices required by the Act before commencing the building of the Bridge; that the erection of the Bridge as by the Act required, and the making the same fit for passage of Travellers Cattle, and carriages, was never certified by two Justices of the Peace, or advertised in one of the public Newspapers in *Montreal*, as required by the Act. The plea further insisted, that supposing the Appellant to be entitled to the benefit and advantages of the Act, the Respondents had not erected any Bridge for the carriage of any persons, cattle, or carriages whatsoever for hire, within the limits of the privilege granted by the Appellant's Act, or in anywise infringed any prohibition contained in that Act; that the Respondents were authorized by the Act incorporating the Company to lay a double or single line of Railway from such point on the *St. Lawrence River* opposite the City of *Montreal*, as the Directors might think most advantageous, in the general direction of *Chambly* and *Shefford* to the outlet of *Memphramagog Lake*, and thence to the Province line in *Stanstead*, with power to construct the different sections in such order as they might see fit; that by the Act amending the last-mentioned Act, the Company were authorized to make and use a branch line from any point on their main line to any point on the *Champlain and St. Lawrence Railway*, even before the completion of their main line; that under the authority of the two last-mentioned

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Acts, the Company entered upon the construction of a branch line of Railway from the village of *Granby* to *St. John's*, on the said *Champlain and St. Lawrence Railway;* that afterwards, by the Act of the 22 Vict. c. 58, the Respondents were authorized to postpone to an indefinite period the construction of that part of their main line between the village of *Granby* and the *River St. Lawrence*, and the branch line then in course of construction from *Granby* to *St. John's* was declared to be part of the main line. The plea went on to allege, that it was impossible for the Company to construct and use their line of Railway in accordance with their several Acts, otherwise than by making a Bridge across the River *Richelieu* at *St. John's*, and that the Respondents were by their Acts authorized to construct, maintain, and use such Railway Bridge, and to appropriate for the use of the Railway so much of the land covered by the waters of the River *Richelieu* as might be necessary to that end, subject only to approval by the Governor in Council of the site and plan of such Railway bridge, and to such rules and regulations as might be thereafter made by the Governor in Council with a view to the protecting of the navigation of the river; and that the Railway Bridge was constructed and was used as an essential and integral part of the Company's line after due approval by the Governor in Council of the site and plan, and in conformity with the Company's powers; and that the Bridge was only passable for Railway locomotives and carriages, and never had been and was not a Bridge or work for the carriage of any persons, cattle, or carriages whatsoever for hire within the true sense and meaning of the special Act of 1826.

To this plea the Appellant replied, by way of special answer in law to so much as alleged the absence of a drawgate, of an opening between the piers of eighty feet at the deepest part of the River, of the elevation of six feet above the level of the River, and the omission of the proper notices and other formalities required by the Appellant's special Act, that such allegations were unfounded in law for several reasons: first, that the Respondents did not pretend that by the facts alleged by them the Appellant had forfeited his Act and lost the privileges granted to him thereby; secondly, that the Respondents did not allege that they had any interest entitling them to complain of any non-performance

or violation of the provisoes and conditions of the Appellant's Act; and thirdly, that the Respondents did not in the part of their plea to which the special answer in law applied, allege that they had suffered or were suffering any damage from the non-performance or the violation of the clauses and conditions of the Appellant's Act. And by way of further answer to the Respondent's plea the Appellant contended that it was false, and could not be substantiated; that he had complied with all the provisoes and conditions of his Act according to its true intent and meaning, and that he had acquired and possessed all the rights and privileges granted to him by the Act; that the draw-bridge required had been constructed by him in accordance with the Act, and that it always had been and was still over the River *Richelieu,* and that its position had been changed only in accordance with the requirements of the Act; that the Respondents had no right to complain of, and had suffered no damage from, any non-performance, deviation from, or violation of the provisoes and conditions of the Act alleged by them in their plea, all of which, however, the Appellant denied; that the Appellant having enjoyed without interruption or challenge for more than twenty years the right of taking tolls on his Bridge, the Respondents could not then question his rights on the ground of non-performance, deviation from, or violation of the provisoes and conditions of the Act, the existence of which grounds, moreover, the Appellant denied; that no law had authorized the Respondents to construct or maintain the Bridge which they had made within the limits prescribed by the Appellant's Act; and he denied all the allegations in the Respondents' plea, except those admitted by his answer.

The cause was heard on the 16th of November, 1865, by Mr. Justice *Sicotte,* and judgment was delivered on the 16th of November, 1866, by him against the Appellant, dismissing his action with costs (1). The principal grounds on which the Court grounded its decision were; that the Respondents built their Bridge in accordance with their Act of Parliament, and the regulations of the administrative authority; that the Appellant had suffered no loss from the Respondents' works; that whatever

(1) See the case reported, 17 Low. Can. Rep. p. 81.

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right of compensation the Appellant might have, he could not demand the removal of the Respondents' works; that the Court had no jurisdiction to give effect to legal rights as against the Ordinance of the administrative authority; that the Appellant could have no right of property over a River; and lastly, that the Appellant, if his rights had been interfered with, should have brought an action for damages.

From this judgment the Appellant appealed to the Court of Queen's Bench, *Lower Canada* (appeal side).

In his *factum* he contended that the issues between himself and the Respondents resolved themselves into four questions: First, had the Appellant by virtue of his Act an exclusive privilege, and was this privilege granted upon the performance of certain conditions, and had they been complied with in such a manner as to secure him the advantage of this privilege? Secondly, could the Respondents allege the non-fulfilment of these conditions, without any cause of complaint, without alleging any grievance or inconvenience to any particular individual or to the public, and without first demanding and obtaining the forfeiture of the Appellant's privilege? Thirdly, had the Respondents interfered with the Appellant's privilege, and if so, had they obtained any such rights *de plano*, without adopting any formality, and without any obligation on their part to indemnify him? And fourth, had the Appellant the right to proceed by a demand for an order to remove the Bridge erected by the Respondents? and he contended that, under the answer to the fourth question, the Respondents were trespassers, and that, therefore, his only remedy was by action "*En dénonciation de nouvel œuvre.*"

The Respondents in their *factum* rested their defence on four grounds, any one of which they contended was sufficient to defeat the Appellant's action: first, that the Appellant was entitled to the exclusive privileges claimed by him only on the fulfilment by him of the condition precedent of building his Bridge in a particular manner, a condition he was proved by the evidence not to have fulfilled; secondly, that the Respondents had statutory authority for building the Bridge complained of; thirdly, that the Bridge of the Respondents was not such a Bridge as was prohibited by the 6 Geo. 4, c. 29; and, lastly, that supposing that the Respondents

could be made to pay damages for acts done by them under Statute, the Appellant had failed to prove any damage resulting to him from their acts.

The appeal was heard by the Court of Queen's Bench, composed of Chief Justice *Duval*, and the Justices *Caron*, *Badgley*, *Monk*, and *Stewart*, the latter Judge sitting in lieu of Mr. Justice *Drummond*, who was incompetent to sit, from his being the President of the Railway Company. After taking time to consider, the Court, on the 7th of September, 1869, affirmed the judgment of the Court below, with costs.

The appeal was from this judgment of affirmance.

Mr. *Matthews*, Q.C., and Mr. *Hemming*, for the Appellant:—

The rights of the parties in this appeal depend upon the construction of Acts of the Provincial Parliament of *Lower Canada*. The Appellant claims under an Act passed in 1826, 6 Geo. 4, c. 29, intituled "An Act to authorize *R. Jones* to build a Toll-bridge over the River *Richelieu*, in the parish of *St. Luke*, at *St. John's*, near the *Rapids*, to fix the rates of Tolls for passing thereon, and to provide regulations for the same." This exclusive privilege was accompanied by certain conditions, which, it was proved in the action, the Appellant had duly performed, according to the true intent and meaning of the Act, and, as it must be assumed from the admissions and evidence, in a manner satisfactory to the Legislature and Government of the Province. The Respondents are a Railroad Company incorporated by an Act passed in 1853, 16 Vict. c. 107 — and further empowered by subsequent Acts, 18 Vict. c. 185, passed in 1855, and 22 Vict. c. 57, passed in 1858. At the passing of these Acts there was, and is still, a general Act in force of the Province of *Lower Canada*, 14 & 15 Vict. c. 51, which regulates the privileges of Companies who are authorized to construct Railways in *Lower Canada;* corresponding now with sect. 11, ch. 66 of the Consolidated Statutes of *Canada*. Portions of this general Act were incorporated in the Respondent Company's Act, namely, those relating to incorporation, powers to make surveys, and take lands, both public and private, at valuations, affording compensation, to be ascertained in manner therein provided: and by the sub-section 19

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of the last-named Act, the 14 & 15 Vict. c. 51, it is enacted "that upon payment or tender of the compensation awarded or agreed upon the Award or agreement shall vest in the Company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation shall have been awarded or agreed upon." The Act, therefore, by implication, prohibits the Company from exercising its power till that condition has been fulfilled. There is good reason why such a condition precedent should be imposed. The Canadian Act is founded on the English *Lands Clauses Consolidation Act*, 1845, 8 & 9 Vict. c. 18: but unlike the English Act it contains no provision enabling the person damnified to take the initiative for obtaining compensation. He cannot obtain compensation until notice has been given by the Company, for notice by the Company is the very basis of the arbitration. It would, therefore, be monstrous that the Company should be at liberty to exercise their powers free from the condition precedent of giving notice to those whose rights they injuriously affect. If the giving of notice to those who are entitled to compensation is a condition precedent, the Respondents failed in the performance of such condition, for the Appellant was entitled to compensation under the 14 & 15 Vict. c. 51, s. 4, on two grounds, first, by reason of the statutory prohibition contained in his own Act, 6 Geo. 4, c. 29, against the building of a Bridge such as the Respondents have built; and, secondly, by reason of the statutory prohibition in the Appellant's Act against the use of such a Bridge for traffic. That the exclusive rights of the Appellant with respect to his Bridge of taking Tolls, &c., provided by sect. 10 of his Act, are "lands" within the meaning of the *Canadian general Railway Act* (14 & 15 Vict. c. 51, s. 7, sub-s. 2) is clear, and even apart from the statutory prohibition of the mere building of a Bridge, which must necessarily interfere with the Appellant's Tolls, and injuriously affect his franchise, the user, as apart from the construction, of the Railway Bridge is an injury which the Appellant has a right to be relieved against: *Reg.* v. *The Cambrian Railway Company* (1).

There are no powers conferred on the Respondents either by their Act of incorporation or the amending Acts which afford any justification of the course they have pursued; and it is clear that if

(1) Law Rep. 6 Q. B. 422.

the Respondents have, as we contend, failed to fulfil a condition precedent for the execution of their powers, they are liable to an action as ordinary wrongdoers: *Ramsden* v. *Manchester South Junction and Altrincham Railway Company* (1); *Beaudry* v. *The Mayor of Montreal* (2). The action *en dénonciation de nouvel œuvre* was the proper remedy: *Merlin, Questions de Droit*, tit. "*Dénonciation de nouvel œuvre*," §§ 5 and 6, which is the basis of the law of *Lower Canada* on this question. An injunction against the recurrence of the violation of a Common Law right is a matter of course, unless there is something special in the case: *The Imperial Gaslight Company* v. *Broadbent* (3). The fact that the Railway has been completed is immaterial: *Martin* v. *London, Chatham, and Dover Railway Company* (4); *Raphael* v. *The Thames Valley Railway Company* (5); *Wing* v. *The Tottenham and Hampstead Junction Railway Company* (6). Even if the Respondents had the power under the Acts in question to invade the Appellant's privilege, they were not authorized to do so without taking all the preliminary steps which they were bound by their Acts to adopt before taking private property from the Owners of it, and without making full compensation to the Appellant, who has suffered great and serious damage by the Railway Company's invasion of his rights, and was entitled to maintain the action out of which this appeal arises, and to all the relief, in the alternative for damages, *Couch* v. *Steel* (7), *Casswell* v. *Worth* (8), sought by his declaration.

Sir *R. Palmer*, Q.C., and Mr. *Gibbs*, for the Respondents:—

In the first place, the Railway Bridge constructed by the Respondents is not a Bridge within the prohibition of the Act, 6 Geo. 4, c. 29. It is not a Toll bridge within the meaning of sect. 10 of that Act. The fares taken by the Railway Company, though they may include the passage over the Respondents' Bridge, are not such Tolls as are contemplated by the Appellant's special Act. That Act gives no such exclusive privilege as could support the Appellant's demand for the demolition of the Railway Bridge and for the damages claimed. No damage was proved, and the existence of such is merely specula-

(1) 1 Ex. 723.
(2) 11 Moore's P. C. Cases, 399.
(3) 7 H. L. C. 600, 612.
(4) Law Rep. 1 Ch. 501.
(5) Law Rep. 2 Ch. 147.
(6) Law Rep. 3 Ch. 740.
(7) 3 E. & B. 402.
(8) 25 L. J. (Q.B.) 121.

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tive, and, having regard to the use and object of the Railway Bridge, cannot be assessed or ascertained. But, secondly, the Respondents have constructed the Bridge complained of under statutory authority, and there is no ground for saying, that the Act empowering the Railway Company to build a Bridge imposes as a condition precedent on the Respondents the necessity of giving notice of their intention, and a tender of compensation by way of damages; which they contend could never occur. The argument in favour of the supposed condition precedent, that otherwise no security for the payment of compensation is provided, is answered by the fact that a method of obtaining compensation is provided, and that notice by the Railway Company is not necessary to enable a person entitled to compensation to come forward and claim it. The sub-sect. 6 of sect. 11 of c. 66 of the Consolidated Statutes of *Canada* (answering to the 14 & 15 Vict. c. 51, sub-sect. 19, cl. 11, sub-sect. 8) makes the deposit of Maps and plans, and a Book of reference, a general notice to all persons interested, and enables the Company to make its Railway without more, throwing upon persons interested the necessity of coming forward to claim compensation. Now, an admission by a Railway Company of a Claimant's right to compensation is not necessary under the English Statute, 16 Vict. c. 169, to enable a Claimant to take proceedings to obtain compensation: *The East and West India Docks and Birmingham Junction Railway Company* v. *Gattke* (1); *The London and North Western Railway Company* v. *Smith* (2). If the Company must, as a condition precedent to the exercise of their powers, give notice to every individual interested, they would be liable in numberless instances to be treated as wrongdoers at any distance of time, subject only to the *Statute of Limitations*. That could never have been intended. But even if there be such a condition precedent, it could not benefit the Appellant, for he was not entitled, as we maintain, to any compensation at all, and, therefore, there was no condition precedent in his case to break. The injury occasioned by the use of the Railway Bridge is not within the Canadian Act any more than, as determined in *The Hammersmith Railway Company* v. *Brand* (3), and *The Glasgow Union Railway Company* v. *Hunter* (4), within the English or

(1) 3 Mac. & G. 155.
(2) 1 Mac. & G. 216.
(3) Law Rep. 4 H. L. 171.
(4) Law Rep. 2 H. L., Sc. 78.

the Scotch Acts. The case is still stronger upon the Canadian Act, 22 Vict. c. 66, s. 5, or 14 & 15 Vict. c. 51, s. 4, than on the English or Scotch Acts. Even if the condition precedent contended for is provided by the Canadian Act, that alone is a valid reason that injury effected by user cannot be within the kind of damages for which compensation is given by the Act; as it must be impossible to foresee who will be damaged by the use of the Railway. We maintain, that no damage has been caused to the Appellant. The construction of the Respondents' Bridge would not of necessity diminish the Appellant's tolls, so as to bring this case within the authority of *Reg.* v. *Cambrian Railway Company* (1), and make it a case of injury by the construction of the works. It cannot be said, that the Appellant's Act prohibited the erection of the Railway Bridge. Whichever way the case be looked at, the acts complained of were not pointed at by the Appellant's Act, 6 Geo. 4, c. 29. Even if there was in general the condition precedent contended for, and the Appellant was entitled to compensation, still in this particular case no action could be brought against the Company as wrongdoers, this being the case of a Bridge over a navigable River, and navigable Rivers being under a distinct section of 16 Vict. c. 169, s. 8, which forbids deviation, and, therefore, makes the building of the Bridge lawful. If the Appellant has any right of action against the Respondents as wrongdoers, it is not in the present form, which is *en dénonciation de nouvel œuvre*, similar to that in *Brown* v. *Gugy* (2). The remedy is pointed out in *Pothier, Civ. Proc.* pt. 2, ch. 3, sec. 5. The action which the Appellant has brought is not for damages, but for demolition of the Bridge: and the Appellant's right, if any, is not even for damages, but to the treble tolls and forfeiture mentioned in his own Act.

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Their Lordships' judgment, having been reserved, was now pronounced by

SIR MONTAGUE SMITH:—

This is an appeal from a judgment of the Court of Queen's Bench of *Lower Canada* affirming a decision of the Superior Court of that Province dismissing the Appellant's action.

(1) Law Rep. 6 Q. B. 422. (2) 2 Moore's P. C. Cases (N.S.) 341.

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Whatever may be the precise technical nature of this action, it is plain that, both in its substance and form, it is founded on a supposed wrong done by the Railway Company to the Appellant in the erection of a Railway Bridge over the River *Richelieu*, by which he alleges that certain rights, conferred upon him by his Act as the Owner of a Bridge over that River, have been unlawfully infringed.

There can be no doubt that the Company have Legislative authority under their Act to carry their Railway over the River by a Bridge, and it was admitted by the learned Counsel for the Appellant, in the outset of his argument, that having such power, the building of the Bridge would have been lawful, and this action, therefore, not sustainable, if the Company had taken proper proceedings under their Act to assess and give compensation to the Appellant; but he contended that these proceedings were a condition precedent to the right of the Company to exercise their Statutable powers, and that before taking them they were in no better position than if the powers had not been granted, and they were strangers committing a wrong.

Much greater prominence has been given to this contention at their Lordships' Bar than was done in the Courts below, where other important points arising in the case were more fully discussed.

The question thus raised involves the construction of the general Railway Acts of the Province upon points of some practical importance, and if decided according to the Appellant's contention, Railway Companies would be in peril of committing involuntarily a variety of wrongful acts in the execution of their works.

The facts of the case are as follows:—

By an Act of *Lower Canada* (6 Geo. 4, c. 29) the Appellant was empowered to build a Bridge over the River *Richelieu*, to take tolls or pontage from persons using it, and to erect a Toll-house and turnpike. He was bound by the Act to maintain the Bridge. The benefit to be derived by the Appellant from the tolls was protected by the 10th section of the Act, which is as follows:—[His Lordship read the section, *ante*, p. 99.]

The Bridge was built and has been used for several years by the public on payment of toll.

By another Canadian Act (16 Vict. c. 107) the Respondents

were authorized to construct a Railway from a point near *Montreal* to the Province Line in *Stanstead*.

In making this Railway it became necessary to carry it over the River *Richelieu*, and, accordingly, the Company built a Bridge, which forms an integral part of their Railway, across the River above the Appellant's Bridge, and within the prohibited limit, viz., a league of it.

It is not material to go into a minute description of the line taken by the Company for the Railway, because it was admitted by the Counsel for the Appellant that the act of the Company in building the Bridge in this place would have been within their powers, and lawful as against the Appellant, provided that they had complied with the provisions of their Act.

Whilst the Bridge was being built, the Appellant served a notice on the Company—not claiming compensation, but denouncing the work as a violation of the privilege granted to him under his special Act, and he subsequently commenced this action, which appears to be, in part, an *action en dénonciation de nouvel œuvre*, wherein he claims, in effect, the demolition of the Bridge, an injunction, and damages.

Some evidence was given by the Appellant that people and carriages had been carried across the River by the Respondents' trains, who would otherwise have gone by the Appellant's Bridge, thereby causing loss to him. It was denied by the Company that any loss was so caused.

Their Lordships do not think it necessary to go into this inquiry of fact on the present appeal, because, assuming that the claims in the action are divisible and independent, still they are all founded on a supposed wrongful proceeding of the Respondents, and unless this is established, the suit even for damages actually sustained cannot be supported.

The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful; whilst the claim for compensation, under the Railway Acts, supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the Tribunal to which recourse should be had.

It follows from what was admitted by the Appellant's Counsel,

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viz., that the building of the Railway Bridge would have been lawful provided the Company had complied with the provisions of their Act, and from what has been already said, that to succeed in this action the Appellant must establish two things:—

First, that he has some right or property injuriously affected which entitled him to compensation under the Railway Acts; and, secondly, that the making of such compensation was a condition precedent to the exercise of the powers granted by these Acts to the Company.

Their Lordships have come to the conclusion, for the reasons hereafter stated, that, supposing the Appellant is able to establish a right to compensation, the making of such compensation by the Company was not a condition precedent to the legality of what they have done.

Having arrived at this conclusion, it is not necessary for the decision of this suit to determine whether the right to compensation exists, but their Lordships think it desirable, in order to explain their view of the case, to consider the nature of the Appellant's right, and the manner in which it may have been injuriously affected.

The right is not that of an ancient Ferry, with the incidents attached to it by the ordinary law, but a privilege created by an Act, and defined and limited by it. The right so created is to build the Bridge over the River and to take Toll. It is protected to a limited extent, and a limited extent only, by the prohibitions contained in the 10th section. If the remedies provided by this section had been co-extensive with the prohibition, and had been all given for the benefit of the Appellant himself, it would seem that in such case no action like the present would lie at all, even against a wrongdoer, upon the principle that where a new duty or prohibition is created by Statute, and the same Act gives a remedy for the breach by penalty or otherwise, for the benefit of the party grieved, he has no other. (See Lord *Campbell's* judgment in *Couch* v. *Steel* (1)). In the present case, however, the only remedy which is plainly given to the Appellant, is the right to the treble Toll, and it is by no means clear that the 40*s.*, payable for each person, &c., carried, is not a penalty which by section 14 goes to the Crown and the Informer. However, it is not necessary now to decide the point, whether these remedies exclude the right of

(1) 3 E. & B. 412, 413.

action; for their Lordships are not prepared to advise that the action be dismissed on that ground; and whether the right of action be so excluded or not, their Lordships consider that the Appellant has a property by virtue of his special Act, which would entitle him to compensation under the provisions of the Railway Acts, if he can shew that it has been injuriously affected within the meaning of those provisions—which leads to the consideration of the next question, whether it has been so affected, and if so, in what manner, by the acts of the Company.

It has been decided by the House of Lords, upon the construction of the English Railways and Lands Clauses Acts, that damage caused to property by the authorized use of a Railway, after it is made, is not damage resulting from "the construction of the Railway," or "the execution of the works," so as to entitle the sufferers to compensation, and that those who have their properties rendered unfit for habitation by vibration or noise, unavoidably caused in the proper use and working of a Railway, can neither bring an action for a nuisance, because such use and working are authorized and lawful, nor obtain compensation, because the Statutes have not in terms given it for such damage: *Hammersmith Railway Company* v. *Brand* (1); *City of Glasgow Union Railway Company* v. *Hunter* (2). The provisions of the Canadian general Railway Acts appear to be substantially to the same effect as the English Statutes, so far as regards the points thus decided, and it was contended by the learned Counsel for the Respondents, that the present case was within the principle of these decisions, on the ground that the injury was not caused by the construction of the Bridge, but by its use. Their Lordships would certainly think it right to recognise the high authority of the above decisions in their advice to Her Majesty in any case where the circumstances were the same. But it was contended by the Appellant's Counsel that the facts of this case were not the same. It was said that, although it may be true that the damage is not complete until the Bridge is used for traffic, the injury done in the present case is not merely a nuisance incidentally affecting the enjoyment of property, but the very right of the Appellant is directly infringed and disturbed by the competing Bridge of the Respondents.

(1) Law Rep. 4 H. L. 171. (2) Law Rep. 2 H. L., Sc. 78.

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To support this view, the recent case of *Reg* v. *Cambrian Railway Company* (1) was cited, where the Court of Queen's Bench held that the Owner of a Ferry was entitled to compensation from a Railway Company for building a Bridge which disturbed his custom. In that case the Bridge not only carried the Railway, but was also a foot Bridge. The distinction between the case cited and those in the House of Lords is certainly fine, and was admitted to be so by the Court; because it was not the erection of the Bridge, but the use of it, when made, which really disturbed the Plaintiff's Ferry. Mr. Justice *Blackburn* so allows when he says, "an action for the disturbance of a Ferry would not have lain for merely building a Bridge, but would only have lain where special damage was shewn, viz., where it was shewn that people used it to cross the river instead of using the Ferry" (2). The decision of the Court seems mainly to rest on the ground that the Bridge built for the use of foot passengers, when so used, inevitably disturbed the Ferry, and, therefore, was, in law, an infringement of the right. But although such use as would be made of a foot Bridge might inevitably cause a disturbance of an adjoining Ferry, it by no means follows that the use of a Railway Bridge would do so; on the contrary, cases may be conceived where the Railway might be so worked as to cause no loss of custom or disturbance to a Ferry.

If, however, it be assumed, according to the Appellant's contention, that the case cited in the Court of Queen's Bench was properly distinguished from the decisions in the House of Lords, and that the present case is within the principle of that distinction, their Lordships consider that it is not the construction of the Railway Bridge, authorized by the Statute, but the use of it, when constructed, for the conveyance of traffic, which injuriously affects the privilege of the Appellant, and gives him, if at all, the right to compensation, and that in any view of this case he would have no such right unless he is able to establish loss of custom in fact, by the making and use of the Railway.

This, then, being the nature of the claim to compensation, and assuming it could be established in law and in fact, can the Appellant treat the Bridge as being unlawfully built because he has

(1) Law Rep. 6 Q. B. 422. (2) Ibid. 431.

not been beforehand compensated? This depends on the construction of the Acts.

The 4th clause of the *Railways Clauses Consolidation Act* of *Lower Canada* (14 & 15 Vict. c. 51), gives the general right to compensation. It enacts that the power to take lands for the construction of the Railway "is to be exercised subject to the provisions and restrictions of the Act," and that compensation is to be made to the Owners of lands so taken, "or injuriously affected by the construction of the Railway, for the value, and for all damages sustained by reason of such exercise as regards such lands of the powers vested in the Company;" the compensation to be ascertained and determined in the manner provided by the Act. By the interpretation clause (7) "lands" are to include all real estate and hereditaments.

The 9th clause, 4th sub-section, gives the Company power to make the Railway upon the lands on the line of it.

By the 10th clause, sub-section 1, a plan is to be prepared of the lands "to be passed over and taken for the Railway," and also a Book of reference, with names of the Owners; and by sub-section 4, it is provided that until such plan and Book are deposited in manner provided, "the execution of the Railway shall not be proceeded with."

Then the 11th clause enacts "that the conveyance of lands, their valuation, and the compensation therefor," shall be made in the manner therein mentioned. This procedure provides for a notice to be given by the Company to the Owner, which, in case no agreement is come to, forms the basis of an arbitration.

The 19th sub-section provides, that upon payment or tender of the compensation awarded or agreed upon, "the Award or agreement shall vest in the Company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation shall have been awarded or agreed upon, and, if resistance is offered, a Judge may issue a warrant to put the Company into possession, and to put down the resistance."

There is also a proviso that such possession may be given, where it is necessary to proceed with the Railway, without such Award or agreement, upon security being given.

It was contended for the Appellant that upon these clauses, and

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especially sub-section 19 of clause 11, the powers of the Act could not be exercised until compensation was made.

Their Lordships consider that this might be so held with regard to the taking of lands for making the Railway,—a question which does not now arise. But it is a different question, whether this is so in the case of lands or easements which are not taken, but only injuriously affected by the Railway. It is obvious that cases must frequently occur where injuries may happen subsequently to the building of the Railway, and as an unforeseen consequence of the works, such as damage to buildings having a right of support from the adjacent land, appearing only when the excavations for the Railway are made, owing to some unknown state of the soil; or injury done to drains, or to rights of passage and communication, and to other non-apparent easements, of which the Company may have had no notice. It is not reasonable to suppose that when the Legislature gave powers to the Company to make the Railway on the lands indicated on their plan, it intended that the Company should, in cases like these, be subject to actions as wrongdoers, and to the legal liability of having their works stopped, because compensation had not been first made to all persons injuriously affected by the consequences of their operations.

Coming, then, to the Appellant's case, and assuming that he may be able to establish a right which has been injuriously affected, his claim would be founded on this, that his statutable right was disturbed by the Railway Bridge, carrying passengers and traffic, which would otherwise have crossed the River *Richelieu* by his Bridge. It has been already pointed out that this injurious effect does not arise necessarily from the construction of the Bridge, but may do so from the use of it; and it is apparent that if the Railway had never been completed, or if no disturbance had taken place by its carrying traffic which would have otherwise come to his Bridge, the Appellant would not have been injuriously affected, or entitled to compensation at all.

The powers of the later Canadian Act (22 Vict. c. 66) appear to be substantially to the same effect as the earlier Act.

The practice under the English Acts has been, that possession of lands cannot be taken until the purchase-money has been paid or secured, but the making compensation for injuriously affecting

lands has not been considered to be a condition precedent, so as to leave the Company open to actions, if it has not been made.

In the above case cited to support the claim of the Appellant, the remedy was not an action, but proceedings by arbitration, under the compensation clauses: *Reg.* v. *Cambrian Railway Company* (1).

It is true the English Acts differ in some respects from the Canadian Act, and it was pointed out by the Appellant's Counsel that the prohibition of the 84th section of the English *Lands clauses Act* is confined in terms to the entry upon lands; and that there is no clause in the Canadian Act equivalent to the 68th clause of the English Act, which provides a mode in which compensation, when not made by the Company, may be enforced.

But it is to be observed, that there are no prohibitory words against entering on lands or exercising the powers of the Act before payment, in the Canadian Act. The words of the 19th sub-section are affirmative, that upon payment or tender, the Award or agreement shall vest the power in the Company. It is not enacted, that until this is done the authorized works shall not be executed. It is said that this is implied. But when an implication is made, it should be reasonable; and in construing these Acts, it may properly be made according to the subject-matter. Their Lordships are not now dealing with the lands taken for the Railway, but with an interest injuriously affected, if at all, by matters arising subsequent, not only to the taking of the lands, but to the construction of the Railway Bridge. It is not a reasonable construction of the Statute to imply, as a condition precedent, that compensation must be paid for such consequential injuries before doing the work.

It was contended, that no machinery was provided by the Act by which compensation can now be assessed, for it was said that unless the notice mentioned in the 7th sub-section of the 11th clause was given, none of the machinery provided by the Act could be put in motion. If this is so, it might afford an argument against the right of the Appellant to compensation at all, and it might be inferred from it, that cases like the present depending on the use of the Railway, were not contemplated.

(1) Law Rep. 6 Q. B. 422.

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But it is obvious, as already pointed out, that there may be many cases of damage to property arising during or after the construction of the Railway from the works themselves, which would certainly fall within the general obligation to make compensation imposed on Companies by the 4th clause. Their Lordships consider that if in such cases the Company did not, on application, take steps to appoint an Arbitrator and proceed to arbitration, the Claimant might take proceedings by way of *mandamus* to compel them to give the notice provided by the 7th sub-section of the 11th clause, or to appoint an Arbitrator. In such proceedings the Court would determine, whether the Claimant was entitled to compensation before issuing a peremptory *mandamus*, as in the case of *Reg.* v. *The Cambrian Railway Company* (1).

If the Appellant's contention is allowed to prevail, Railway Companies would, in all cases of possible contingent claims, however doubtful, be obliged to give notices declaring their readiness to pay compensation (in fact admitting the right to it) at the hazard, if they omitted such notices, of being treated as wrongdoers, and of having their works demolished or stopped.

Their Lordships, for the above reasons, have come to the conclusion that this action cannot be maintained, and they will, therefore, humbly advise Her Majesty to dismiss the appeal, and to affirm the judgments of the Canadian Courts with costs.

Solicitors for the Appellant: *Hensman & Nicholson.*
Solicitors for the Respondent: *Wilde, Wilde, Berger, & Moore.*

(1) Law Rep. 6 Q. B. 422.

LOUISA MIGNEAULT . . . . . APPELLANT; J. C.*

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EULALIE MALO AND JEAN-BAPTISTE BROUSSEAU . . . . . RESPONDENTS. *Jan.* 13, 15.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Law of Lower Canada—Wills before the Civil Code of Lower Canada—Imperial Statute, 14 *Geo.* 3, *c.* 83, *s.* 10—*Imperfect Testamentary paper—Personalty —Probate—Colonial Act*, 41 *Geo.* 3, *c.* 4, *s.* 2.

M., domiciled in *Lower Canada*, in 1865 (before the Civil Code of *Lower Canada* came into operation), being dangerously ill sent for a Notary to make his Will. The Notary attended with two Witnesses, and *M.* expressed verbally before them the provisions he intended to make by his Will, including an annuity to *A.* The Notary inquired of the Witnesses if they understood *M.'s* wishes, and they said that they did, whereupon the Notary proceeded to reduce *M.'s* expressed intentions into writing, in the form of a solemn Will according to the French Law, and had written down as far as the bequest of the annuity to *A.*, but before a disposition in favour of his only Daughter and appointment of Executors was written *M.* died. The two Witnesses, at the Notary's request, at once made a declaration in writing of what *M.'s* intentions were regarding the disposition to be made by his Will. *A.* petitioned the Superior Court of the Province for probate of the partly prepared Testamentary paper, and that Court granted probate of the imperfect instrument with the written statement of the Witnesses, as containing the Will of the deceased. *M.'s* heir was cited, and opposed the grant. *A.* afterwards brought an action for payment of the annuity. In defence to the action *M.'s* heir disputed the validity of the Will. The Superior Court gave judgment for *A.* on the ground that the sentence of the Court granting probate was conclusive; the Court of Queen's Bench in *Lower Canada* reversed that judgment. On appeal, *held* by the Judicial Committee:—

First, that according to the uninterrupted practice and usage of the Courts in *Lower Canada* since 1801, on the construction of the *Colonial Act*, 41 Geo. 3, c. 4, s. 2, the grant of probate was not, as in *England*, conclusive, and that it was competent to *M.'s* heir to impugn the Will by way of defence to *A.'s* action.

Secondly, that although *M.* intended to make a Will according to the French

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* *Present*:—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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Law, and the imperfect Testamentary paper was void as a Will by that Law, yet that the verbal bequest, coupled with the unfinished Testamentary paper, was a good bequest as respected personalty and entitled to probate, as the Imperial Statute, 14 Geo. 3, c. 83, s. 10, introduced the English Law as to Wills existing at that time into *Lower Canada*, and carried with it the rules of the English Courts as to the admissibility of oral evidence in cases of nuncupative Wills, or unfinished Testamentary dispositions of personalty.

IN this case the question raised respected the right of the Appellant to an annuity bequeathed to her by one *Prudent Malo*, a Merchant of *Belœil*, in *Lower Canada*, and domiciled there, and the effect, according to the Law of *Lower Canada*, of probate in the Canadian Courts to an unexecuted Testamentary paper, as a Will, in the form prescribed by English Law.

The facts were these :—

The action was brought by the Appellant against the Respondents to recover the arrears of an annuity bequeathed by *M. Malo.*

The declaration was filed in 1866, and alleged that *Prudent Malo* died on the 25th of April, 1865, and left an only Daughter, the Respondent, *Eulalie Malo* (the Wife of the other Respondent, *Jean-Baptiste Brousseau*), who had succeeded to and had taken possession of the estate of her deceased Father; that *Prudent Malo* on the 25th of April, 1865, made his Will, duly executed according to law in so far as regards moveables, and by his Will left the Plaintiff an annuity of £25 for her life; that the Will was duly proved before Assistant Justice *Monk*, and probate of it granted on the 27th of December, 1865; that it cost the Plaintiff £25 to obtain the probate, which she alleged that she had a right to recover from the Defendants, who had unjustly and in bad faith contested the Will, and that on the 25th of August then last past, sixteen months of the annuity was due to the Plaintiff, amounting to the sum of £33. 6*s.* 8*d.*

The Plaintiff filed with the declaration copies of the probate of the Testamentary paper of *M. Malo*, and of the proceedings and evidence which preceded its grant. From these proceedings it appeared, that the Plaintiff had on the 20th of July, 1865, presented a petition to the Superior Court of *Montreal* praying for probate of the Will of *M. Malo*, and had cited the Defendants to

appear, as representing the succession of the Testator; that the Defendants appeared and contested the grant of probate, and that the Plaintiff called several Witnesses, and amongst others, *Elzéar Blanchard*, who produced a paper writing, which contained the testamentary wishes of the Deceased as expressed by him before three persons present at the time, and immediately before his death, and which was written immediately afterwards; and another Witness, *J. B. Brillon*, who produced an unfinished Will, the writing of which was interrupted by the death of the Testator, but which contained a bequest to the Plaintiff of the annuity in question. The Defendants having declined to call Witnesses, and having been heard by their Counsel, the Court, on the 27th of December, 1865, gave judgment granting probate of the above two papers, and ordering them to be registered on the Registry of probate of the Court.

The Defendants pleaded a special plea, which, in effect, alleged that the Will was not properly executed, that the probate of it was null and void, that the proofs adduced were irregular and ought not to have been admitted, and that the Plaintiff was not entitled to the costs of proving it. They also pleaded the general issue.

The Plaintiff joined issue on the pleas, and also demurred to the first plea on the ground that the Defendants were not entitled to question the probate.

By consent of the parties the evidence given on the proceedings in the Superior Court for the probate of the testamentary papers, a copy of which had been filed by the Plaintiff with her declaration, was admitted as given in the action. This evidence consisted of the depositions of four Witnesses: *Elzéar Blanchard*, *Jean Baptiste-Allard*, *Vilbon Blanchard*, *Joseph R. Brillon*, and two paper Writings produced in evidence by *Elzéar Blanchard* and *Joseph R. Brillon*. From this evidence it appeared, that on the 25th of April, 1865, *M. Malo* being ill, and having been told by his Doctor that he was not likely to survive long, sent for *Brillon*, a Notary, to make his Will. *Brillon* told him that it was necessary that there should be two Witnesses, and that when they were present he ought to say and explain in their presence what he intended to do. *Malo* accordingly directed him to send for *Vilbon Blanchard* and *Elzéar Blanchard* for that purpose. *Vilbon Blanchard* and *Elzéar Blanchard*

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having arrived, and being alone in the room with the deceased and *Brillon*, the deceased said, "I wish to make my Will," and then stated the disposition of his property which he wished to make, and which he had previously stated in the morning in similar terms to *Brillon*, the Notary, and afterwards to Dr. *Allard*, one of his Executors. When he had finished, *Brillon*, the Notary, asked the two other Witnesses if they understood the Testator's wishes, and on their saying "Yes," proceeded to write out the Will. While he was doing so, and when he had completed the clause relating to the bequest to the Plaintiff, the Testator fell back in his chair and expired. *Brillon* then ceased writing, and with the Witnesses went into a neighbouring room, and within half an hour of *Malo's* death drew up a statement of his testamentary wishes as he had expressed them, including the bequest of the annuity to the Plaintiff. The statement so drawn up, and the unfinished Will written by *Brillon*, were the two papers of which Probate was granted by the Court (1).

On the 31st of May, 1867, the Superior Court, Mr. Justice *Berthelot* presiding, gave judgment in favour of the Plaintiff for £43. 15*s*., being £25 for one year's annuity, and £18. 15*s*. for the costs of proving the Will.

The Defendants having inscribed the cause for revision before three Judges of the Superior Court of *Montreal*, on the 28th of March, 1868, that Court, consisting of the Justices *Mondelet*, *Berthelot*, and *Monk*, sitting as a Court of revision, affirmed the judgment of the 31st of May, 1867, Mr. Justice *Mondelet* dissenting.

The Defendants appealed to the Court of Queen's Bench for *Lower Canada*, and that Court, consisting of the Chief Justice *Duval*, and the Justices *Caron*, *Drummond*, *Badgley*, and *Loranger*, gave judgment on the 9th of September, 1869, reversing the two judgments of the Superior Court, and dismissing the Plaintiff's action with costs.

The appeal was from this judgment of reversal of the Superior Court.

Mr. *H. M. Bompas*, for the Appellant:—

There are two questions—first, whether the validity of the Will of a domiciled Canadian made in 1865 (before the promulgation

(1) These documents are set out in the judgment, *post*, pp. 132, 133.

of the Civil Code of *Lower Canada*) is to be determined by the English Law introduced by the Imperial Statute, 14 Geo. 3, c. 83, s. 10, or by the general French Law in force in *Lower Canada;* and secondly, whether probate granted by the Superior Court to such a Will is not conclusive, so as to prevent such Will being impugned by the heir of the deceased as not valid by the Law of *Lower Canada.*

[SIR JAMES COLVILE:—As the Respondents raise an objection to the power of the Assistant Judge of the Superior Court to grant probate, and the consequent validity of the probate itself, their Lordships wish that point to be argued first.]

By the Law of *England* as well as *France* the grant of probate is conclusive evidence of the testamentary character of the instrument. A Will admitted to probate can only be impeached on appeal from the Court of Probate, or set aside by a suit for the revocation of the probate: 1 *Jarman* on Wills, p. 22 [3rd Ed.]; *Cardwell* v. *Rea* (1); *Allen* v. *McPherson* (2). The probate, therefore, is conclusive evidence that the writings admitted to probate constitute valid testamentary dispositions. By the old French Common Law of the Province of *Lower Canada* only two forms of solemn Wills were valid—the authentic, or notarial, and the *olographic.* The first was executed before public Officers, namely, two Notaries, or one Notary and two Witnesses. The Testamentary dispositions were to be dictated by the Testator to the instrumenting Notary, who was to read the Will to the Testator for his approval, and to be then signed by the Testator and the two Notaries, or by one Notary and two Witnesses, as the case might be, when it became an authentic *Minute,* or notarial *Acte,* having full authenticity in itself, without other proof of its execution: 1 *Henry's* Works, *lib.* 5, *quest.* 8; *Bretonnia, Cod.,* sect. 4, Dis. 1, No. 4. The *olographic* form of Will must be entirely written and signed by the Testator: 2 *Despeisses,* p. 72; *Lacombe, Rec. de Jurisp., verb.* "*Testament,*" p. 323. The notarial, or authentic form of Will is recognised in Art. 843 *et seq.* of the Civil Code of *Lower Canada.* By the Imperial Statute, called the *Quebec Act* of 1774 (14 Geo. 3, c. 83, s. 10) it was provided that every Owner of lands, goods, &c., in the Province, who had a right to alienate them in his lifetime, might devise or

(1) Stuart's Low. Can. Rep. 331.

(2) 1 H. L. C. 191.

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bequeath them by last Will or Testament, such Will being executed either according to the Laws of *Canada* or according to the forms prescribed by the Law of *England*. This Statute introduced into *Lower Canada* the Law of Wills then in force in *England*, and included imperfect Testamentary papers, relating to personalty, and nuncupative Wills. It appears that from this period, at least, if not previously, the mode of obtaining probate of Wills in *Lower Canada* executed in the English form was similar to the practice now in use, and according to which the Will in question was proved, for in 1801 the *Provincial Act* (41 Geo. 3, c. 4), was passed, which recited that doubts having arisen regarding the method to be followed of proving last Wills and Testaments, made and executed according to the forms prescribed by the Law of *England*, before one or more of the Judges of the Courts of Civil Jurisdiction in the Province, in order to remove those doubts it was, by sect. 2 of that Act, declared, that the Civil Judge should be authorized to grant probate of such Wills, as by a Court of Probate; and it is stated by Mr. Justice *Badgley*, in his judgment in this case, that since that time probates have been granted by the Judges of the Civil Court as before, in conformity with the Common Law of the Province, and according to the recognised and admitted legal maxim "that the Law of the Testator's domicile is the rule for Probate." A single Judge has full power: Con. Stat. *Lower Canada*, 1860, ch. 78, s. 23.

The Will, therefore, being valid, whether made in the English or French form, and having been made before the promulgation of the *Code Civil*, which has abolished nuncupative Wills for the future, it was sufficient to establish that the Will possessed all the conditions necessary to entitle it to probate. That was our contention in the Court below; and, as regards the *factum* of the Will, the probate thus obtained is conclusive. By the French Law, even if the grant of probate is to be treated only as an authentication of the Will, it is conclusive until set aside by a competent authority: Civil Code of *Lower Canada* Arts. 1210, 1222; *Pothier, Traité des Obligations, Tom.* I., pp. 474-482.

Mr. *Hemming*, for the Respondents:—

The papers admitted to registration as the Will of *Prudent Malo*

were, on the face of them, not his Will. The Order of the Assistant Judge of the 27th of December, 1865, directing such registration on the registry of probate, and all proceedings taken under that Order, were inoperative upon any question relating to the validity of such alleged Will. It was not a Will executed according to the English law relating to Wills introduced into *Lower Canada* by the 14 Geo. 3, c. 83, sect. 10, and according to the *lex fori* it was not entitled to probate as a nuncupative Will, such form of Will being unknown to and inadmissible by the law of *Lower Canada*, or as an imperfect testamentary paper: Civil Code of *Lower Canada*, Art. 1233, sec. 7. As in contracts, the law of the Country where the contract is to be enforced governs the admissibility of evidence: *Bain* v. *The Whitehaven and Furness Junction Railway Company* (1); *Yates* v. *Thomson* (2); and not, as insisted here, the practice of the English Court of Probate and the rules regarding Testamentary papers, which are only, at the highest, inferentially introduced by the Statute, 14 Geo. 3, c. 83, sect. 10. By the Law and practice of *Lower Canada* the registration of the Will was not conclusive, and did not preclude the Court there from holding in the action by the Appellant that the deceased did not make such a Will as alleged, or any Will, and it was not requisite before disputing such Will that the registration of it should be annulled. The *Lower Canada Act*, 41 Geo. 3, c. 4, s. 2, giving power to the Court to grant probate of "Wills and Testaments" according to the Laws of *England*, made pursuant to, and by authority of, the Imperial Statute, 14 Geo. 3, c. 83, sect. 10, clearly never contemplated or intended to include such Testamentary papers as were then admitted to proof by the Courts of Probate in *England*, and, among them, nuncupative Wills.

THEIR LORDSHIPS directed Counsel to proceed on the question of the validity of the testamentary paper as a Will.

Mr. *H. M. Bompas*:—

It will be necessary to consider this question both by the French Law prevailing in *Lower Canada* and by the English Law intro-

(1) 3 H. L. C. 1. (2) 3 Cl. & F. 544.

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duced by Imperial or Provincial Statutes. As regards the Law of Wills, the French Law as it existed previously to the *Code Napoléon*, according to the Custom of *Paris*, was the Law received and acted on in *Lower Canada* previous to the introduction of the English Law of Wills by the 14 Geo. 3, c. 83, sect. 10, and the proof of such Wills by the Provincial Statute, 41 Geo. 3, c. 4. Mr. Justice *Badgley*, in his judgment in the Court below, enumerates only two kinds of Wills made in solemn form, the one before two Notaries or a Notary and two Witnesses, and the other by a holograph writing, which required no Witnesses. In neither case could the Testator dispose of more than a part of his property. On his death the whole property real and personal vested in the heir named in the Will, the Executors having power to deal with the property only as representing the heir. This Law was altered by the Imperial Statute, 14 Geo. 3, c. 83, sect. 10, which provided that every Owner of lands, goods, &c., in the Province who had a right to alienate them in his lifetime, might devise or bequeath them by last Will and Testament, such last Will being executed either according to the Law of *Canada* or according to the forms prescribed by the Law of *England*. The forms of Wills which existed in *England*, and the rules as to the admissibility of Testamentary papers and evidence received in the Ecclesiastical Courts, were thus introduced into *Lower Canada*. In *Meiklejohn* v. *The Attorney-General of Lower Canada* (1), this Tribunal held, that under that Statute a Will which was invalid by the French Law, and not executed according to the English Statute of Frauds so as to pass lands, passed Copyholds and Leaseholds, and was valid, therefore, as a disposition of personal estate, and that, although a deceased person intended to make a Will, in solemn form, according to the French Law, and the instrument being imperfect and incomplete, was void by that Law, yet it might nevertheless be valid by the English Law: *Masterman* v. *Maberley* (2); *Lambert* v. *Gauvreau* (3). Art. 855 of the Civil Code of *Lower Canada* is declaratory of the Law in *Lower Canada*, and the following Article, 857, regarding the probate and proof of Wills, is evidence of what

(1) 2 Knapp's P. C. Cases, 328. (2) 2 Hagg. Ecc. Rep. 235.
(3) 7 Low. Can. Rep. 277.

the Law was in that respect previous to the promulgation of the Civil Code. The paper Writing produced by the Witness *Blanchard* was, by the English Law, a valid nuncupative Will committed to writing by Witnesses: *Freeman* v. *Freeman* (1); *Lemann* v. *Bonsall* (2); *Bennett* v. *Jackson* (3); and the imperfect Testamentary paper produced by *Brillon* the Notary, so far as it relates to the bequest of an annuity to the Appellant, being complete, was a good written Will as respected personal property, and one Courts of Probate would before the passing of the *Wills Act*, 1 Vict. c. 26, have granted probate of: *Nathan* v. *Morse* (4); *Forbes* v. *Gordon* (5); *Montefiore* v. *Montefiore* (6); *Deveraux* v. *Bullock* (7); *Brown* v. *Hallett* (8); *Allen* v. *Manning* (9); *Castle* v. *Torre* (10). Effect would be given to such imperfect Testamentary paper by Courts of Law and Equity: *Lemayne* v. *Stanley* (11); *Ellis* v. *Smith* (12); and entitle the Appellant to receive the annuity out of the Testator's personal estate.

Mr. *Hemming*, for the Respondents:—

The formularies required by the French Law, as stated on the other side, are conclusive that *Prudent Malo* never made a Will. The papers were improperly admitted to probate as his Will. The Imperial Statute, 14 Geo. 3, c. 83, s. 10, which enacts, that Wills or Testaments executed according to the forms prescribed by the Laws of *England* are entitled to probate, was intended to apply only to properly executed Wills, and not to embrace nuncupative Wills or imperfect Testamentary Papers. None of the cases cited on the other side regarding such imperfect testamentary papers apply. In *Munro* v. *Coutts* (13) the House of Lords held that an unfinished paper was not a Testament or Will. So in *Lower Canada, Colvill* v. *Flanagan* (14). The agreement as to evidence, and the proceedings in the action, the questions on the merits as to the validity of the alleged Will, and as to the sufficiency and admissibility of

(1) 1 Lee's Ecc. Rep. 343.
(2) 1 Add. 389.
(3) 2 Phil. 190.
(4) 3 Phil. 531.
(5) Ibid. 614.
(6) 2 Add. 354.
(7) 1 Phil. 72.
(8) 2 Lee's Ecc. Rep. 418.
(9) 2 Add. 490.
(10) 2 Moore's P. C. Cases, 133.
(11) 3 Lev. 1.
(12) 1 Ves. 11.
(13) 1 Dow. 437.
(14) 3 Low. Can. Jur. 238.]

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the evidence adduced by the Appellant in support of it, were intended to be, and were, in effect, submitted to the Court below free from the technical question, whether the registration ought not also to be annulled. A grant of probate might be recalled on the ground of fraud.

1872 *Feb.* 3.

Their Lordships reserved judgment, which was now pronounced by

SIR ROBERT PHILLIMORE:—

This is an appeal from a judgment of the Court of Queen's Bench for the Province of *Quebec*, which reversed the judgment of the Superior Court for *Lower Canada*, sitting in the district of *Montreal*.

The litigation relates to the execution of a Will, and the following short statement of facts is necessary:

Prudent Malo, a Merchant of *Belœil*, died on the 25th of April, 1865, leaving an only Daughter, and property in moveables and immoveables of the value of about £8,000. On the morning of that day *Malo* was dangerously ill, and being apprised of his danger by his medical Attendant, desired him to fetch a Notary named *Brillon*, for the purpose of making his Will. *Brillon* came and had an interview with the deceased, who said he wished to make his Will, and it was arranged that two Witnesses of the name of *Blanchard* should attest it. The deceased said that he wished to bequeath an annuity of twenty-five *louis* to the *demoiselle Migneault*, giving reasons for his wish; that he desired his debts to be paid; twenty-five *louis* to be given to the poor of his Parish; the residue of all his property to his Daughter, *Madame Brousseau*, for her life, and afterwards to her children born or to be born of her present or any other marriage, and he named three Executors. The deceased seems to have made a similar statement of his intentions to his medical Attendant.

The Notary and the Witnesses arrived about twelve o'clock; in their presence the deceased said, "*Je veux faire faire mon testament.*" He then said as follows:—

"*Je recommande mon âme à Dieu; je veux que toutes mes dettes et torts soient payés; je veux que mes funérailles soient faites avec le moins de pompe possible, en laissant cependant cela à la discrétion de*

mes exécuteurs testamentaires; je donne aux pauvres de la Paroisse de Belœil cent piastres, à leur être payés vingt-cinq piastres par an. Je vieux qu'il soit payé à Mademoiselle Migneault vingt-cinq louis par an pourvu qu'elle ne se marie pas. Je donne et légue à ma fille, épouse de Jean-Baptiste Brousseau, en jouissance tous mes biens tant qu'elle vivra, et la propriété je la donne aux enfants nés et à naître du mariage avec M. Brousseau, ou de toute autre mariage contracté par la suite. Je nomme pour mes exécuteurs testamentaires mes amis le docteur Allard, le docteur Rottot, et mon gendre Brousseau. Il dit alors que c'était toutes ses dispositions. Je veux aussi que la majorité de l'opinion de mes exécuteurs testamentaires prévalent dans le règlement de mes affaires."

The Notary asked the Witnesses if they clearly understood what *M. Malo* had stated; he then proceeded to write, and having made what may be called a religious preface, proceeded as follows:—

"Deuxièmement. Veut et ordonne le dit Sieur Testateur que toutes ses dettes soient payées, et torts par lui faits, réparés, si aucuns se trouvent, par ses exécuteurs testamentaires ci-après nommés.

"Troisièmement. Veut et ordonne le dit Sieur Testateur que ses obsèques aient lieu de la manière le plus modeste possible; laissant tout à la volonté et discrétion de ses exécuteurs testamentaires ci-après nommés.

"Quatrièmement. Veut et entend le dit Testateur qu'il soit payé à Demoiselle Louise Migneault annuellement sa vie durante, pourvu qu'elle ne change pas de nom, une somme de cent piastres.

"Cinquièmement. Donne et légue, le dit Testateur aux pauvres de la Paroisse de Belœil une somme de cent piastres, à leur être payées par payement de vingt-cinq piastres par an.

"Sixièmement. Quant à tous les autres biens, tant meubles qu'immeubles, argent, or, en dettes et obligations, meubles de ménage et autres biens généralement quelconques que le Testateur délaissera et qui lui appartiendront à son décès sans en excepter."

When he had finished his last word the Testator died; before, therefore, the bequest to his Daughter, and the appointment of the Executors was written, and before he had signed the paper.

It appears that the two Witnesses afterwards retired to another room and wrote as follows:—

"Nous soussignés, ayant été requis par feu Prudent Malo comme

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témoins de son testament, nous étant rendus auprès de lui avec M. Brillon, Notaire, ils s'exprima ainsi : se tournant vers M. Brillon, il lui dit : 'Vous allez écrire mon Testament. D'abord que mes dettes soient payées, qu'une pension de 100 *dollars par année soit payée à Delle. Migneault tant qu'elle ne changera pas de nom, je donne aux pauvres de la Paroisse de Belœil une somme de* 100 *dollars payable vingt-cinq dollars par année. Que mes services funéraires soit faits avec modération à la discrétion de mes Exécuteurs testamentaires.*

"'*Tous mes autres biens en jouissance à ma fille et en propriété à ses enfants nés et à naître de son présent mariage et tous autres mariages qu'elle pourra contracter.*

"'*Je nomme mon ami J. B. Allard, mon ami le Doctr. Rottot, et mon gendre Brousseau mes Exécuteurs testamentaires ; qu'une majorité des trois prévale dans leurs délibérations.*'

"*Belœil,* 25 *Avril,* 1865.

(*Signé*) "*Elzéar Blanchard,*
"*V. Blanchard.*"

On the 20th of July, 1865, the Appellant, *Migneault,* presented a petition to a Judge of the Superior Court, praying for probate of the Will as contained in the two paper Writings to which I have referred. *Madame Brousseau* and her Husband, the Respondents, were cited to appear and did appear. The Appellant examined the Witnesses whom I have mentioned in support of the Will, and they were cross-examined on the part of the Respondents, who also put in an answer, or, as it was termed, "*défense au fond en droit.*" They did not, however, produce any Witnesses, though special time was allowed them for so doing, but addressed an argument to the Court by their Counsel against the validity of the Will; and, on the 27th of December, 1865, the Court, consisting of a single Judge, Mr. Justice *Monk,* gave sentence in favour of the Appellant, and directed probate to be granted of the two papers as together containing the Will of the deceased, and condemned the Defendants in the costs.

In the month of September, 1866, the Appellant brought her action in the Superior Court for the annuity, and for the costs awarded to her in the Probate Court; the action was formally contested by the Respondents, and it was arranged that the evi-

dence (subject to all exceptions) taken before the Court of Probate should be used. Mr. Justice *Berthelot* heard the cause, and decided in favour of the Appellant, apparently on the double ground that the sentence of the Probate Court was valid,—"*Vú que la dite sentence du vingt-sept Décembre, mil huit cent soixante-cinq, est dans toute sa force et vertu, et doit avoir tout l'effet que lui donne la loi ;*"—and that the Appellant was entitled to succeed upon the merits.

The case was next heard before the Court of revision, composed of three Judges, two of whom were Judges *Monk* and *Berthelot*, who maintained their opinion, the other Judge dissented; there was then an appeal to the Court of Queen's Bench, consisting of five Judges, who unanimously reversed the sentence of the Inferior Courts.

From this decision the present appeal has been instituted.

No controversy is raised as to the facts in this case. It is clear that the deceased was of perfectly sound mind—that he intended to make his Will in solemn form, before a Notary and two Witnesses, and to dispose of his property in the manner described in the papers of which probate has been granted.

The contention is as to the law applicable to these facts.

The contention is two-fold:

The first is, that the probate granted is not conclusive, as a judgment *in rem* or a judgment *inter partes*. There is no doubt that a probate in *England* granted in solemn form after due citation of parties would have this effect. And it is certainly much to be lamented if a rule of law and practice so obviously conducive to the interests of justice and the quieting of litigation does not prevail in *Lower Canada*. Their Lordships, therefore, desired this part of the case to be argued separately. The result is as follows:—

Previously to the year 1774, and the passing of the Imperial Statute, 14 Geo. 3, c. 83, Wills, according to the Common Law of *Canada*, could be made only in one of three ways:

First, before two Notaries.

Second, before a Notary and two Witnesses.

Thirdly, by a holograph writing which did not require Witnesses.

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The Statute (or *Quebec Act*, as it is usually called) 14 Geo. 3, c. 83, however, introduced another form of Will, enacting, by section 10, "That it shall and may be lawful to and for every person that is owner of any lands, goods, or credits in the said Province, and that has a right to alienate the said lands, goods, or credits, in his or her lifetime, by deed of sale, gift, or otherwise, to devise or bequeath the same at his or her death by his or her last Will and Testament, any law, usage, or custom heretofore or now prevailing in the province to the contrary hereof in anywise notwithstanding, such Will being executed either according to the laws of *Canada* or according to the forms prescribed by the laws of *England*."

There appears never to have been, and not to exist at present, any Court which exercises a special jurisdiction with respect to Wills.

A practice dictated by obvious convenience or necessity seems to have grown up in *Canada*, after the conquest of that Country by *England*, of registering, or, as it was somewhat loosely termed, proving, Wills made according to English Law before a Judge of the Civil Court. This practice, the legal effect of which was very doubtful, continued till 1801, when a Provincial Statute (41 Geo. 3, c. 4, s. 2, incorporated in the Consolidated Statutes, c. 34, s. 3) provided as follows: "Whereas doubts have arisen touching the method now followed of proving last Wills and Testaments made and executed according to the forms prescribed by the laws of *England*, before one or more of the Judges of the Courts of Civil Jurisdiction in the province; be it therefore enacted that such proof shall have the same force and effect as if made and taken before a Court of Probate."

At first sight it certainly appeared to their Lordships that this language availed to introduce the law of *England* with respect to the conclusiveness of a probate duly granted into the law of *Canada;* and that where, as in the present case, a suit as to the validity of the Will had been contested in open Court, both parties appearing, pleading, and one examining, the other cross-examining, Witnesses, and probate had then been granted, the same question could not be raised again, at all events between the same parties, before another Tribunal; but that the production of

the probate would operate as an estoppel to any such action. This, moreover, appears to their Lordships to be the true construction of the words, "such proof shall have the same force and effect as if made and taken before a Court of Probate."

Their Lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts with respect to it for the last seventy years, and they have, therefore, made as careful an investigation into this practice as the circumstances permit.

It appears, in the first place, that no appeal has ever been instituted from a decree or grant of probate made by the Court—that it is very doubtful, whether any allegation or plea as to the merits, for instance, a plea or allegation setting up insanity or undue influence, could be propounded, or would be admitted on an application for probate.

It is enacted by the 23rd section of the 78th chapter of the Consolidated Statutes of *Lower Canada*, in the year 1860, that "any Judge of the Superior Court, at any place where the said Court or the Circuit Court is appointed to be held, shall, in any Court or out of Court, in term or out of term, or in vacation, and any prothonotary of the Superior Court at the place where his office is therein held, shall, out of Court, but in term or out of term, have, and may exercise within and for the District in which such place as aforesaid lies, the same power and authority as is then vested in the Superior Court and the Judges thereof, in what respects the probate of Wills, the election and appointment of Tutors and Curators, as well under the general law as under the provisions of chapter 87 of these Consolidated Statutes relating to insolvent Debtors, or any other Act, the taking of the counsel and opinion of relations and friends in cases where the same are by law required to be taken, the closing of inventories, attestation of accounts, insinuations, affixing and taking off seals of safe custody, the emancipation of minors, the homologation or refusal to homologate proceedings had at any *avis de parents* called or held by or before any Notary, and other acts of the same nature requiring despatch; and the proceedings in all such cases shall form part of the records of the Superior Court at the place where they are had, or of the Circuit Court at such place, if the Superior Court be not held there.

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(2.) " But the appointments and orders made by any Prothonotary under this section, or made under the same by any Judge out of Court, shall be liable to be set aside by any Judge of the said Court, sitting in the same District in Court and term, in like manner and under the provisions of law in and under which appointments and orders made by one or more Judges out of Court in matters requiring despatch may be set aside by the Superior Court (12 Vict. c. 38; 20 Vict. c. 44, s. 91)."

In the Civil Code of *Lower Canada*, which became law in 1866, therefore, after the making of the Will in question, it is enacted (sect. 3, § 856), " The originals and legally certified copies of Wills made in authentic form, make proof in the same manner as other authentic writings."

(§ 857) " Holograph Wills and those made in the form derived from the laws of *England*, must be presented for probate to the Court exercising superior original jurisdiction in the District in which the deceased had his domicile, or, if he had none, in the District in which he died, or to one of the Judges of such Court, or to the Prothonotary of the District. The Court, or Judge, or the Prothonotary, receives the depositions in writing, and under oath of Witnesses competent to give evidence, and these depositions remain affixed to the original Will, together with the judgment, if it have been rendered out of Court, or a certified copy of it, if it have been rendered in Court; parties interested may then obtain certified copies of the Will, the proof, and the judgment, which copies are authentic, and give effect to the Will until it is set aside upon contestation.

" If the original of the Will be deposited with a Notary, the Court, or Judge, or the Prothonotary, causes such original to be delivered up.

(§ 858.) " The heir of the deceased need not be summoned to the probate thus made of the Will, except it is so ordered in particular cases.

" The functionary who takes the probate takes cognizance of all that relates to the Will.

" The probate of Wills does not prevent their contestation by persons interested."

In the fourth Report of the Commissioners, which preceded the enactment of the Civil Code, it is said (p. 179):

"The third section treats of the proof of Wills, and also of the preliminary probate, before a Judge, of such as have not been made in authentic form. A Will frequently concerns several parties, by all of whom it would be difficult to have it acknowledged, though these persons and even third parties be interested in submitting its validity without delay to a preliminary test. The proceeding adopted for this purpose is well known in *England* and in this Country under the name of probate; it is more particularly in use in *England*, where Wills have no form corresponding with our authentic form. In the old French law, as well as in the ancient practice in this Country, traces are still found of a similar probate as regards holograph Wills. It is not, however, necessary to extend the researches upon this point, the probate of holograph Wills and of Wills made in the English form having uniformly been effected in the same manner, which is that of the common form of probate adopted in *England*, where a more solemn form of probate is also practised, to which the parties interested are summoned and by which they are bound. This latter form of probate is not in use in this Country, unless it be compared to a contested action before the Courts. The probate here takes place before a Judge and out of Court. Our Provincial Statute of 1801 merely says that the form of probate then in use shall continue to be practised." . . .

The "contestation" spoken of in the Report and the Code does not appear to mean, as it would in *England*, a suit in the Court of Probate, before probate is granted or enforced, but in some other suit, a suit before a Civil Court, in which the validity of the Will is impugned.

Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of Justice since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it has in *England*, and that according to that interpretation it was competent to the

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Respondent to impugn the validity of this Will by way of defence to the action brought by the Appellant for the payment of the annuity.

Their Lordships think that they ought not to advise Her Majesty that a different construction ought now to be put upon the law.

With regard to the form of action adopted in this case, their Lordships do not find that any objection was taken to it in the Court below.

It remains to consider the second branch of contention. It has been argued on behalf of the Appellant,—

First, that though the deceased intended to make a Will in solemn form, according to the French law, yet, if he did in fact make one, bad according to that, but good according to the English law, it is valid.

Their Lordships have no doubt that this proposition is true.

Secondly, it has been argued that, if the Judge was wrong in granting probate of both the papers, at all events the unfinished paper written by the Notary from the instructions of the deceased was a valid instrument according to the law of *England* before the *Wills Act*, 1 Vict. c. 26, and that the Appellant is content to have probate of that paper alone.

Their Lordships are, therefore, relieved from the necessity of considering whether a nuncupative form of Will was valid in *Lower Canada* at the date of *Prudent Malo's* death, and before the recent Code came into operation; as to which, however, they desire not to be considered as expressing any doubt whatever, or whether a probate could be properly granted of a nuncupative Will and unfinished instructions as together containing the Will of the deceased.

The question before their Lordships is reduced within these limits. Is the paper of unfinished instructions such a document as would have been entitled to probate under the law in force in *England* before the present *Wills Act?* For if so it was before promulgation of the Code, which appears to have adopted the *Wills Act*, a good Will in *Canada* under the provisions of the *Quebec Act*, 14 Geo. 3, c. 83. Upon this point their Lordships entertain no doubt.

The law is very clearly laid down in *Montefiore* v. *Montefiore* (1) by a most experienced Judge, Sir *John Nicholl*:—

"The legal principles," he says, "as to imperfect Testamentary papers, of every description, vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every Testamentary paper not actually executed by the Testator, and so executed, as it is to be inferred, on the face of the paper, that the Testator meant to execute it. But if the paper be complete in all other respects, that presumption is slight and feeble, and one comparatively easily repelled. For intentions, *sub modo* at least, need not be proved, in the case; that is, the Court will presume the Testator's intentions to be as expressed in such a paper, on its being satisfactorily shewn that its not being executed may be justly ascribed to some other cause, and not to any abandonment of those intentions, so expressed, on his, the Testator's part. But where a paper is unfinished, as well as unexecuted (especially where it is just begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for, as above, but it must also be proved (for the Court will not presume it) to express the Testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes: so that by establishing it, even in such its imperfect state, the Court will give effect to, and not thwart or defeat, the Testator's real wishes and intentions in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my judgment." He then goes on to say (2):—

"If the instrument is (as it clearly is), in legal construction, one in progress, merely, and unfinished as to the body of the instrument, the legal presumption, surely, is, that, had the deceased not been prevented from finishing it, he would have gone on to provide for his children in a subsequent part of the instrument. I cannot assent to the proposition contended for by one of the Counsel, that, if a Testator dies while the instrument is in progress, that instrument, 'so far as it goes,' be its contents and effect what they

(1) 2 Add. 357.

(2) 2 Add. 359–60.

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may, must be valid. I know of no principle to that broad extent ever laid down; nor was any authority cited in support of it. The rule which I take to operate, in the case of every unfinished paper is this: can the Court infer that by pronouncing for it it will carry into effect what it collects, from all the circumstances of the case, to have been the deceased's wish? In that event it will be its duty to pronounce for it—but surely not, if it sees reason to believe that, by so doing, it will defeat, or counteract, instead of giving effect to that wish."

In another case (*Nathan* v. *Morse* (1)) the same learned Judge said:—

"The facts are satisfactorily established—I have no doubt in pronouncing this to be the Will of the deceased, as far as to the appointment of the Executor: but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the Court goes the utmost length to give effect to intention clearly proved, and reduced into writing in the lifetime of the Testator, yet it has never held that anything added to a Will after death can be established. Death consummates the instrument;—nothing can be added afterwards.

"The last clause must be pronounced against and struck out of the Will.

"I have no doubt of pronouncing for the Will without it."

It was suggested that these decisions, which were made in 1820–2, were judicial developments of the doctrine as to imperfect Testamentary papers, and were not intended to be incorporated into the Canadian Law by the Statute of 1808. But unfortunately for this argument, various decisions of Sir *G. Lee*, a most learned Ecclesiastical Judge, in 1757, fully establish the doctrine which Sir *John Nicholl*, in 1820–21, did not in truth develope, but declared to be the acknowledged existing law.

There can be no doubt that in this case it did completely express the wishes of the Testator, and, therefore, tried by the principles laid down in these and other cases, the paper containing the instructions written out by the Notary is entitled to Probate.

It remains only to consider the objection that the evidence by which these instructions are proved to contain the testamentary

(1) 3 Phil. 530–1.

intentions of the deceased is inadmissible according to the *lex fori* —that is, the Canadian French Law; and for this position Art. 1,233, sect. 7, was relied upon, which requires that there must be "a commencement of proof in writing" (*commencement de preuve par écrit*) in order to admit the oral testimony of Witnesses. If it were necessary to consider whether, in this case this condition as to the commencement in writing had been fulfilled, their Lordships would be strongly inclined to hold that it had been fulfilled; but in truth the case is not one to which the doctrine of the *lex fori* prevailing as to the admission of evidence is applicable at all. The law which introduced into the Colony the English Law as to Wills must be considered as having introduced it with all its incidents, and, therefore, with the admissibility of oral evidence, without which, indeed, the new law would be nugatory and of no effect.

Their Lordships have, therefore, arrived at the conclusion that the judgment appealed from should be reversed; that the judgment of the Superior Court of *Canada* in favour of the Appellant should be affirmed, and that the Respondents should pay the costs of this appeal and those of the Court of Queen's Bench in *Canada*.

Solicitors for the Appellant: *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondents: *Hensman & Nicholson.*

J. C.* 1872 Jan. 30; Feb. 3.

ROSARIO MESSINA . . . . . Appellant;

AND

EUSTACHIO P. PETROCOCCHINO . . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR THE ISLAND OF MALTA.

Foreign judgment — Jurisdiction — Greek Consular Court at Constantinople — Act of Average settlement — Appointment of Curator — Bottomry Bond, exemption of lender from seeing to necessity of.

A foreign judgment of a competent Court is conclusive, and not open to examination by another Court, unless the judgment impeached carries on the face of it manifest error: as if it is shewn to have been obtained by fraud, or wanting in the condition of natural justice. Such judgment cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*.

A Greek Ship having on board a Cargo consigned to *Malta*, the port of destination, having encountered severe weather in her passage down the *Black Sea*, was obliged, for the preservation of her Cargo, to jettison her Boats, spars and cables, and being disabled, put into *Constantinople*, where the Captain applied to the Greek Consular Court, and obtained an order for a survey of the Ship and Cargo, and a sentence of Average settlement, with the appointment of a Curator, who, by virtue of the authority conferred on him, hypothecated the Cargo, and caused a Bottomry Bond to be executed thereon for freight and the necessary expenses of transhipping and forwarding the Cargo. The Cargo having been transhipped arrived at *Malta*, where proceedings were taken in the Court of Commerce by the Consignee to set aside the sentence of Average settlement and to annul the Bottomry Bond. The Court of Commerce declared its incompetency to decide regarding the Average settlement, but pronounced the Bottomry Bond null and void. On appeal to the Court of appeal at *Malta*, that Court reversed the decree of the Court of Commerce, so far as regarded its competency to decide the Average act and settlement, and ordered, as regarded the decision of the nullity of the Bottomry Bond, that such decision should be set aside until a definitive sentence on the Average act and settlement should have been come to by the Court of Commerce. The Court of Commerce gave a decision on the case thus remitted against the Consignee, which was equivalent to a nonsuit. On appeal from this decision, the appellate Court at *Malta* were of opinion, that the Captain having taken the legal course before the Consular Tribunal at *Constantinople*, and that Court having,

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* *Present*:—Sir James William Colvile, Sir Robert Phillimore (Judge of the High Court of Admiralty), Sir Montague Edward Smith, and Sir Robert Porrett Collier.

on the report of Experts, appointed a Curator of the cargo, and declared the voyage ended at *Constantinople*, such Curator was the attorney for the Owners of the Cargo, and had authority to hypothecate the same; that where the formalities of a Consular authority and verbal process justifying the expenses necessitating the loan are observed, the lender on Bottomry is exonerated from justifying the necessity for the loan, or making inquiry as to the facts causing such necessity, and decided for the validity of the Bond:—*Held* by the Judicial Committee, affirming the judgment of the appellate Court at *Malta*, that the Greek Consular Court at *Constantinople* being a competent Court, having jurisdiction over a Greek Ship and a Cargo owned by Greek subjects, the sentence of that Court was not open to examination by the Court of Commerce at *Malta*, and that it must be presumed, in the absence of manifest error or fraud, that the Greek Consular Court rightly interpreted and applied the Greek law, by which they had the power they exercised of deciding that, in the circumstances, *Constantinople* should be considered the place of the Ship's destination, and the average adjusted according to the law in force at that place; and that the Bottomry Bond was, in the circumstances, necessary and valid.

The case of *Dent* v. *Smith* (1) followed.

THIS was an appeal against a decision of the Court of appeal for the Island of *Malta* and its dependencies, revoking two sentences of the Court of Commerce for that Island, in a suit brought by the Appellant as Plaintiff, against the Respondent as Defendant.

The suit was commenced on the 6th of March, 1867, by a citation issued out of the Court of Commerce for the Island of *Malta* and its dependencies at the request of the Appellant, who was a Merchant residing at *Malta*, summoning the Respondent, who was also a Merchant residing at *Malta*, and representative of the firm of *Petrococchino & Co.*, as Agent of *Dimitriacopulo*, of *Constantinople*, and as holder of a Bottomry Bond, to appear and shew cause why all the acts of an average settlement made at *Constantinople* should not be declared irregular, null and void, and of no validity, on account of inherent faults for want of authority and jurisdiction, and for errors they contained, and for other reasons to be orally alleged, and why a Bottomry Bond, made on the 1st/13th of February, 1867, should not be declared null and void, without prejudice to the right of the parties, including Captain *Froutta*, commanding the Greek Brig *Evangelistria*, to proceed to a regular average settlement in the place where the voyage of the *Evangelistria* ought to have terminated, and for all other necessary

(1) Law Rep. 4 Q. B. 414.

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declarations, including that of *Dimitriacopulo*, being held responsible for the damages and interests emerging from his conduct, and without prejudice to the action of *dolus* and *fraus*, with costs.

The circumstances under which this citation was issued, were as follows :—

On the 28th of October (O.S.), 1866, the Greek Brig *Evangelistria*, of which *Froutta* was Master, sailed from *Berdiansk* with a cargo of wheat, which had been shipped by *Negroponte*, Merchant, of *Taganrog*, and bound to *Malta* for orders for some port in the *Mediterranean*. The cargo was consigned to the Appellant.

The *Evangelistria* encountered severe weather in her passage down the *Black Sea*, and after having jettisoned for the preservation of the Ship and Cargo, her Boats, spars, cables, &c., and sustained other damage, she was compelled to put into *Constantinople*. *Negroponte* had an Agent at *Constantinople*, who knew of the arrival there of the *Evangelistria*, in a damaged state, and communicated that fact to the Appellant. The Master of the *Evangelistria* immediately commenced the process required of him by the Greek law in the Commercial Chancery of the Royal Greek Embassy at *Constantinople*, and that Court having heard his petition and examined the Master and others of his crew, appointed certain Surveyors, who, on the 2nd/14th of January, 1867, made a survey of the Ship and reported the same to the Court, which report was duly confirmed by the Consul-General of *Greece* at *Constantinople*, as Judge of the Court. In pursuance of the recommendations of the Surveyors, the Judge of the Court appointed *Dimitriacopulo* Curator of the Cargo of the *Evangelistria*, with directions to charter a Vessel to serve as a store for the Cargo, or, if necessary, to carry the same to its destination. *Dimitriacopulo*, acting as such Curator, on the 15th of January, 1867, chartered the Russian Brig *Otto Sorelle* (called in the charterparty *Otto Fratelli*), in accordance with the authority given to him by the Consular Court, and the Cargo of the *Evangelistria* was accordingly transhipped to the *Otto Sorelle*.

The Surveyors, on the 23rd of January, 1867, made a further survey of the *Evangelistria*, and unanimously reported to the Court, that the *Otto Sorelle* must sail, and carry on to its destination the Cargo of the *Evangelistria*, and this report was, on the

27th of that month, confirmed by the Consular Court. In consequence of the recommendations contained in this report, the Consular Court, in virtue of its decree, named certain Judicial Staters to settle the damages and expenses of average of the *Evangelistria*, and its Cargo at *Constantinople*.

On the 28th of January, 1867, the Judicial Staters ordered (amongst other things), that power should be given to the Curator of the Cargo of the *Evangelistria* to contract a Bottomry Bond for the sum necessary to pay the general and particular average expenses and other amounts due in respect of the Cargo sent on to its destination by the *Otto Sorelle;* and by a prospectus of settlement, which was to form an integral part of their sentence, they fixed the amount for which they gave authority to *Dimitriacopulo*, as Curator of the Cargo, to contract a Bottomry Bond thereon at the sum of 35,760f. 52c., including the premium upon the Bond. This sentence and general average settlement was confirmed to have the force of an adjudication by the Consul-General of *Greece*, as Judge of the Consular Court.

In pursuance of the authority given to him by this sentence, *Dimitriacopulo*, on the 31st of January, 1867, hypothecated the cargo of wheat transhipped to the *Otto Sorelle* to one *M. N. Facher*, as security for the sum of 35,760f. 52c., by a Bottomry Bond duly executed and *viséd* by the Judge of the Consular Court.

The *Otto Sorelle* sailed from *Constantinople*, and on the 25th of February, 1867, arrived at *Malta*.

The Bottomry Bond had been, in the meantime, forwarded properly indorsed by *M. A. Facher* to the Respondent's Firm in *Malta*, with directions to cash the same, and application was made by the Respondent to the Appellant for that purpose. The Appellant then deposited the sum for which the Bond had been given with Her Majesty's Court of Commerce at *Malta*, to remain as security till it should be decided, whether the Respondent had a right to receive the same in respect of his claim under such Bond.

After proceedings in the Court of Commerce, it was, on the 2nd of March, 1867, decided that the deposit should, with the consent of the Appellant, be paid out to the Respondent, and that such payment should be understood to be free and unconditional unless

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the Appellant should bring forward in a suit by way of citation within a certain limited time the claims set forth in the schedule of deposit.

The Appellant thereupon commenced the present suit by filing the citation before stated, and on the 18th of March, 1867, in consequence of a decree of the Court of Commerce, the Appellant presented an additional pleading, in which he set out the facts and matters before stated, and alleged that the *Evangelistria* had not the right of ending the voyage and of making the average calculation in *Constantinople*, and that if the average calculation was null, the Bottomry Bond could not hold good, and, further, that the Bottomry Bond was null because it was made by a person who was not entitled to hypothecate the Cargo, and was not made according to law.

The Respondent, in his answer, alleged that the nullity of the Average settlement, even if declared void, would not bring with it the nullity of the Bond, that the action on it was intended to dispute the procedure and acts of the Greek Consular Court at *Constantinople*, and the same could not be entertained by the Court, and that *Facher* was a stranger to all the acts the nullity of which was asked for by the Appellant, and took his rights under the Bond, having advanced his money on the security of the Cargo.

Both parties entered into evidence, and the suit having been heard on the 22nd of June, 1867, a decision was given by the Court of Commerce, declaring that the Court was not competent, so far as the demand for declaring the nullity of the average acts of settlement was concerned, and decided, in compliance with the demand contained in the second part of the citation, that the Bond was null and void.

From this decision both parties appealed to the first Hall of Her Majesty's Court of appeal, and the Appellant entered into further evidence.

On the 16th of December, 1867, the Court of appeal gave judgment, declaring that the case was within the jurisdiction of the Court of Commerce, as far as the declaration of the nullity of Average settlement was concerned, and so far revoking the sentence delivered by the Court of Commerce, and ordering that upon the other part it should be set aside until the definitive decision in

the Court of first instance on the first part of the citation, and it subsequently remitted the process to the Court of Commerce.

The Court of Commerce having ordered further pleadings, the Appellant, on the 28th of April, 1868, presented a petition disputing the details of the Average settlement at *Constantinople*, and the Respondents presented an answer alleging that they were valid, and that even if any errors existed they would not invalidate the Bottomry Bond. On the 26th of May, 1868, the Court of Commerce delivered judgment, dismissing the Respondent from the further observance of justice in the suit.

From this decision the Appellant appealed to the first Hall of Her Majesty's Court of appeal at *Malta*. The Respondent, by his answer, prayed that the decision of the Court of Commerce should be reformed, so far as that the Appellant might be excluded from the demands contained in the citation or otherwise, and otherwise that the sentence should be confirmed. On the 20th of July, 1868, the Court of appeal, consisting of Sir *Antonio Micallef* and Drs. *Salvatore Nandi* and *Lorenzo Xnereb*, delivered final judgment, to the effect, that there being no doubt as to the application to the case of the rules of the French Code received in *Greece* as law by an Ordinance, and of the formalities required by that Code having been substantially fulfilled, and that the observance of such formalities exonerating the lender from justifying the necessity of the loan, and there being no evidence of collusion on the part of *Dimitriacopulo* or *Facher*, the Court decided for the exclusion of the demanded declaration that the acts made in *Constantinople* were null and of no validity, and also for the exclusion of the demanded nullity of the Bottomry Bond, and revoked the sentences delivered by the Court of Commerce on the 22nd of June, 1867, and on the 26th of May, 1868, and condemned the Appellant in costs.

The appeal was from this judgment.

Mr. *Manisty*, Q.C., and Mr. *T. H. Baylis*, for the Appellant:—

This suit was instituted by the Appellant in Her Majesty's Court of Commerce for the Island of *Malta*, for the purpose of annulling a Bottomry Bond by which a Cargo of wheat, which was shipped at *Berdiansk*, in the *Crimea*, and consigned to the Appellant at *Malta*, was hypothecated at *Constantinople* for the sum of

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35,760f. 52c., and also of impeaching the validity of the proceedings and average act in the Greek Consulate at *Constantinople*, purporting to have the force of a judgment and giving judicial effect to certain average settlements and charges upon the Cargo, and authorizing the Bottomry Bond in question. We contend, that the whole proceedings in the Greek Consulate were irregular and invalid, no notice having been given either to the Owners of the Cargo or their Agent at *Constantinople*. The Average settlement is erroneous and unjust on the face of it, inasmuch as the Cargo is made to contribute in its full value (freight being deducted), and the Ship only half its value and half its freight. Moreover, the settlement includes items which are not the subjects of general average, and to which the Cargo was not bound to contribute: *Hunter* v. *Prinsep* (1). Again, the Average settlement ought to have been made at *Malta*, which was the place of destination of the Cargo, not, as it was, at *Constantinople*: *Simonds* v. *White* (2).

The greater part of the average loss alleged to have been sustained by the Ship was declared by the Captain to have been sustained before the Ship put into *Sebastopol*, where she stayed, as it appears, for about a month before she sailed for *Constantinople*; but no Protest was made there, nor any notice taken of any average loss having been sustained, although the Captain there stated that jettison took place after consultation with the Crew. By the 413th Article of the *Code de Commerce* the Captain was bound to take the first opportunity of reducing to writing the result of such consultation, and affirming it within twenty-four hours of his arrival at the next port. It was his duty also to forward the Cargo: *Blasco* v. *Fletcher* (3). There was no necessity to raise money on Bottomry; and even if there was a judgment of the Greek Consular Court ordering that a Bottomry Bond should be taken, yet that judgment is not conclusive: *Bank of Australasia* v. *Nias* (4); *Power* v. *Whitmore* (5); *Monroe* v. *Pilkington* (6). It is a recognised rule that if Foreign law is relied on by a party which differs from the general maritime law, such Foreign law must

(1) 10 East, 378.
(2) 2 B. & C. 805–811.
(3) 14 C. B. (N.S.) 147.
(4) 16 Q. B. 717.
(5) 4 M. & S. 141.
(6) 2 B. & S. 11.

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be proved as a fact, which has not been done in this case. Supposing the necessity for a Bottomry Bond to have existed, yet the Curator who negotiated the Bond had no right to hypothecate the Cargo without communicating with the Owners or their Agent, and especially when there was such an Agent in *Constantinople*, who, it appears from the evidence, had funds in hand. But the repairs to the Ship not being made for the preservation or the forwarding of the Cargo, the Curator had no right to hypothecate the Cargo to pay for such repairs; and if the Bond is to be discussed without reference to the judgment of the Consular Court, it is evident that it is bad, the Owners of the Cargo not having been communicated with: *Heathorn* v. *Darling* (1). Moreover, it was the duty of the lender to see that there was a necessity for the Bond: *The Orelia* (2); *The Bonaparte* (3); *The Cargo ex "Galam"* (4); *Abbott* on Shipping [11th Ed.], ch. iii., sec. 5.

Mr. *Butt*, Q.C., and Mr. *E. C. Clarkson*, for the Respondent:—

The act of the Greek Consular Court at *Constantinople* was a judicial and not a ministerial act, and that Court being a Court of competent jurisdiction, such judgment was a binding judgment, and would be recognised by the comity of Nations by any Court in which an action on that judgment was brought: *Castrique* v. *Imrie* (5). Therefore, the Bottomry Bond taken in pursuance of such judgment is a valid Bond. The nature and extent of the jurisdiction of the Consular Courts in *Turkey* is stated by *Wheaton*, International Law [Ed. by *Laurence*], pp. 217, 224. The history and extent of the power of the Consular Court in *Turkey* is to be found in the judgment in *The Laconia* (6). The sentence of average Staters appointed, as in the present case, was fully considered in the case of *Dent* v. *Smith* (7), though in that case it was determined to be a case of salvage and not of average. There was sufficient necessity to support the Bottomry Bond, and even if it is to be looked at independently of its character as a judicial act of

(1) 1 Moore's P. C. Cases, 5.
(2) 3 Hagg. Ad. Rep. 75.
(3) 8 Moore's P. C. Cases, 459.
(4) 2 Moore's P. C. Cases (N.S.) 216.
(5) Law Rep. 4 H. L. 414.
(6) 2 Moore's P. C. Cases, 161, 185.
(7) Law Rep. 4 Q. B. 414.

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a competent Court, it is a valid Bond. It is true that the general rule is, that the place of destination is the place of jurisdiction; but if the Cargo is separated, as was the case here, then the port of delivery would be the one having jurisdiction: *Emerigon, Tom.* ii. ch. 4, sec. 8, pp. 475, n., 476. The Consular Courts of *Constantinople* had jurisdiction in this case. Under the 245th and 247th Articles of the French *Code de Commerce,* received in Greece as law by the Ordinance of the 19th of April, 1835, the Master Commander of the Brig *Evangelistria* having put into *Constantinople* on account of damage sustained, was bound to direct himself for the necessary procedure to the Consulate, who thereby became judicially seized of the case, and authorized to appoint a Curator, and upon his report to order a Bottomry Bond to be contracted for. According to the provisions of the French *Code de Commerce,* the formalities prescribed for the validity of a Bottomry Bond contracted in a Foreign Country was the same as those determined by Article 234 of that Code for Masters who, during their voyage, should require to borrow money on the Ship and Cargo. These formalities are the Consular authorization, which exonerate the lender and justify the necessity of the loan. The Curator appointed by the Consular Court was in the place of the Owner of the Cargo, and acting under the Court's direction, had full authority to hypothecate the cargo.

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Their Lordships' judgment was delivered by

SIR ROBERT PHILLIMORE:—

This is an appeal from the Court of appeal at *Malta,* in the matter of a Bottomry or hypothecation Bond.

In October 1866, *Negroponte,* a Merchant at *Taganrog,* shipped, at *Berdiansk,* a cargo of Wheat belonging to a Greek Owner, on board a Greek ship, the *Evangelistria,* and consigned it to *Messina* (the Appellant), to be delivered to his order at *Malta,* or at such ports as the Consignee should there order. The Captain, *Froutta,* had letters of recommendation to *Cossudi,* the Agent at *Constantinople* for *Negroponte.*

Negroponte and the Appellant are jointly interested in the shipment.

The charterparty was sent by *Negroponte* through *Cossudi* to *Messina*, the Appellant. The *Evangelistria* sailed, she encountered bad weather, and was obliged to jettison a part of her Cargo. She put back to *Sebastopol;* she sailed again, and again encountered bad weather, which necessitated further jettison, and arrived in a damaged condition at *Constantinople* on the 27th of December, 1866.

Upon the 30th of December the Captain went before the Greek Consular Tribunal (or the Greek Royal Commercial Chancery, as it is called) at *Pera*, made a protest, and applied for the survey of the Ship and Cargo; the Court appointed Surveyors, who drew up "a sentence and average settlement." In their first report the Surveyors, after stating various reasons, said:—

"Whereas, for the above reasons, the Cargo of the *Evangelistria* must be transhipped on another Vessel, to be chartered under double conditions, to serve as store, or to send, in case of need, the Cargo to its destination:

"Whereas, there being in this Town no legitimate representative of the Owner of the Cargo, a Curator to the same must be named by the competent authority:

"Moved by these reasons, we have unanimously agreed, that the Royal Greek Commercial Chancery should appoint a Curator to the Cargo, who, with the knowledge of the representative of the Underwriters, will charter a Vessel of the same burden of the *Evangelistria*, with the double condition to serve as store, or, if necessary, for carrying the Cargo to its destination, and to commence without loss of time the transhipment of the Cargo in question."

A Greek Merchant, by name *Dimitriacopulo*, was appointed Curator by the Court; his Agent is *Petrococchino*, the Respondent.

In their second and last report the Surveyors recommended that the Cargo should be transhipped on board a Vessel called the *Otto Sorelle;* the Captain further petitioned for the appointment of "Average or judicial Staters;" they were appointed by the Court, and decided, among other things, as follows:—

"1. That the expenses of transhipment made by the Curator to the Cargo, his commission, the interest of the Bottomry Bond, and the remaining freight to be paid to send the Cargo to its destina-

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tion, must be classified in particular average to be suffered by the Cargo alone.

"2. That in the general average must be put the damages of the Vessel, fixed by the Surveyors at 44,558 *piastres*, the expenses of survey and towing, &c., incurred by the Captain, the fees of Chancery, the fees of the legal adviser and compiler of several acts, the fees of the Judicial Staters, of the representative of the Underwriters, and the compiler of the present decision and average settlement, for which expenses the Cargo will contribute with its value, freight deducted, and the Vessel with half its value and half its freight, as it is to be seen by the settlement prospectus which is to form an integral part of the present sentence.

"3. That the freight of the Vessel *Evangelistria* is fixed to two-thirds of the freight agreed on in the charterparty, to two-thirds of primage, and the gratuity entire free of contribution.

"4. That power should be given to the Curator of the Cargo to contract a Bottomry Bond for the sum necessary to pay the freight of the *Evangelistria*, average expenses, &c., under hypothecation of the Wheat cargo, sent to its destination by the Vessel, *Otto Sorelle*."

This decision was confirmed by the Greek Consul-General, who declared it to have the force of a thing adjudicated: a Bottomry Bond was also ordered and was given to a Mr. *Facher* as a security for 35,760f. 52c. The Bill of lading, the average statement, and the Bottomry Bond were sent by the Curator to *Petrococchino*, at *Malta*.

The *Otto Sorelle* arrived with her Cargo at *Malta* on the 26th of February, 1867. *Petrococchino* refused to deliver the Cargo without payment of the Bottomry Bond. *Messina*, the Appellant, refused to pay, and at last paid under protest, and litigation ensued.

A suit was instituted by the Appellant against *Petrococchino* in the Court of Commerce at *Malta*. The Appellant called upon him to shew cause why in the first place the pretended "Average Acts" made at *Constantinople* should not be declared irregular, null, and of no validity on account of inherent faults, for want of authority and jurisdiction, and for the errors they contained, and for other reasons to be orally alleged, and why as a consequence,

the pretended Bottomry Bond should not be declared null and void, and if necessary, annulled without prejudice to the right of the parties or whomsoever else it might concern, including the Captain, *Frutta,* to proceed to a regular Average settlement in the place where the voyage of the *Evangelistria* ought to have terminated, and claimed damages against *Dimitriacopulo* (without prejudice to an action against him for fraud) with costs against the Respondent.

The Court of Commerce decided against the Appellant on the ground that it had no jurisdiction in the matter of the average, but in his favour as to the Bottomry Bond, declaring it void. Both parties appealed to the appellate Court at *Malta,* which decided that the inferior Court had jurisdiction as to the average, but gave no judgment as to the Bottomry Bond, and remitted the case.

The Court of Commerce, on the 26th of May, 1868, gave judgment that the suit, so far as it related to the demand for the nullity of the Average acts, had been "illegally observed," by reason of the Appellant not having summoned all the parties concerned in the average acts, and especially Captain *Frutta,* of the Brig *Evangelistria,* and that nothing was proved sufficient to make *Dimitriacopulo* liable in damages, and decided for the discharge of the Respondent *nomine* (that is, in the character in which he was sued) *ab observantia judicii,* with costs; the effect of which judgment was equivalent to a nonsuit.

Both parties again appealed; and on the 20th of July, 1868, the appellate Court decided that the "Captain of the *Evangelistria,* having taken the legal course in going before the Consular Tribunal at *Constantinople,* and that Court having, on the report of Experts of the necessity for unloading and transhipping the Cargo in order to repair the Ship, appointed *Dimitriacopulo* Curator of the Cargo, and declared the voyage of the *Evangelistria* ended at *Constantinople,* and authorized *Dimitriacopulo* to give a Bottomry Bond, he must be considered by a third party as the Attorney for the Owners of the goods, and had authority to hypothecate them. That where the formalities of a Consular authority and verbal process justifying the expenses necessitating the loan are observed, the lender on Bottomry is exonerated from seeing

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the necessity of the loan proved. That in the present case the sentence of the Court supplied the Consular authority, and the expenses having been incurred under the control of the Consul, and sanctioned by the sentence, the production of verbal process was not important, and that substantially the formalities were to be taken as complied with, and that the lender was not bound to make inquiry as to the facts causing the necessity of the loan. That there was no proof of any fraudulent collusion between *Facher*, the lender of the money, and *Dimitriacopulo*, or that *Dimitriacopulo* simulated expenses, or committed any irregular or deceitful acts to the damage of the cargo, or even if he had himself acquired an interest in the Bond, would that have affected its validity, and that any omissions on his part, even if they resulted in damage and gave a cause of action, would not nullify the Bond, and that it was not necessary to summon Captain *Frutta*, the Master of the *Evangelistria*."

From this decision the appeal has been prosecuted to this Tribunal.

It has been strongly urged upon their Lordships, that all the proceedings in the Greek Consular Court, which were in substance upholden by the Court of appeal in *Malta*, were invalid; and principally upon the following grounds: that, with regard to the Bottomry Bond, no adequate necessity is shewn for having recourse to it, and also that it is bad because not preceded by any communication, or attempt at communication, with the Owner of the Cargo; and, with regard to the general average, that the proper place for the adjustment of it was *Malta*, the port of destination, and not *Constantinople*.

Their Lordships are called upon now to pronounce a judgment in favour of these propositions, sitting as an appellate Tribunal from the Court of *Malta;* in other words, to give that judgment which it is alleged that the Court appealed from ought to have delivered. Their Lordships are not sitting as an appellate Tribunal from the Greek Consular Court at *Constantinople*. It is necessary to make this statement *in limine*, however obvious it may appear, for the following reason. If the Greek Consular Tribunal was a competent Court, having jurisdiction over the Ship and Cargo, then the sentence of that Court was not open to examination by the Court

at *Malta*, but would be properly enforced by it, or, in the clear language of Lord *Ellenborough*, in the case of *Power* v. *Whitmore* (1), "By the comity which is paid by us to the judgment of other Courts abroad of competent jurisdiction we give a full and binding effect to such judgments, so far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate." This case was decided in the year 1815.

And it is to be observed that, though the earlier cases exhibit some fluctuation and variety with respect to the application of this doctrine, it has become firmly established by a series of later cases as an unquestionable maxim of our jurisprudence. The strongest and the last case is that of *Castrique* v. *Imrie*, decided by the House of Lords in the year 1870 (2).

A Foreign judgment of a competent Court may indeed be impeached, if it carries on the face of it a manifest error; if it is shewn to have been obtained by fraud, or to be wanting in the conditions of natural justice; and it cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*.

No such infirmities can in this case be predicated of the decree and orders of the Greek Court, and, therefore, the consideration as to the competency of that Court alone remains to be considered.

It has been much pressed upon us that there is no evidence of such competence, and that the acknowledged rules of the general maritime law applicable to Bottomry Bonds on Cargo have been violated by the proceedings of the Court.

Now, this was the sentence of a Greek Consular Court sitting at *Constantinople* upon a Greek Ship, and a Cargo owned by Greek subjects.

The holder of the Bottomry Bond was a stranger who, acting *bonâ fide*, advanced his money on the Bond.

That the Ottoman Porte has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws within its dominions is a fact *publici juris*, which their Lordships are not now called upon for the first time

(1) 4 M. & S. 150. (2) Law Rep. 4 H. L. 414.

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to take cognisance of, and which they fully recognised in the case of *The Laconia*, in the year 1863 (1). It would be strange indeed, if it had been otherwise, inasmuch as Her Majesty has established a Supreme Consular Court at *Constantinople* and Provincial Courts, with rules for the exercise of civil and criminal jurisdiction. This kind of jurisdiction exercised by the Consuls of Christian States in Mahomedan Countries is to be carefully distinguished from the ordinary powers exercised by Foreign Consuls in Christian States

Judicial cognisance being, therefore, taken by their Lordships of the fact that a Greek Tribunal, capable of exercising jurisdiction in this case, existed at *Constantinople*, it is the duty of their Lordships to apply to such a Tribunal the ordinary principles which regulate the reception of the judgment of a Foreign Tribunal by other Courts.

During the course of the argument our attention was properly drawn to the case of *Dent* v. *Smith*, in which the competence of the Russian Consular Court at *Constantinople* was placed upon this footing by the Court of Queen's Bench. In that case, the particulars of which it is not necessary to mention, Lord Chief Justice *Cockburn* said :—

"The facts lie in a very narrow compass. The Ship, having become a Russian ship, is wrecked in Turkish waters ; the gold, the subject-matter of this insurance, is saved by being immediately sent on shore, the Captain taking advantage of having to send his Boat, and thinking it best to save this portion of the Cargo, which, of course, was by far the most valuable part, and, from its small bulk, the part most easily saved. He deposits it or causes it to be placed in the hands of the Russian Consul. It is unnecessary to follow these proceedings in any detail through their course ; but afterwards a claim is made in respect of the expenses, which were incurred in endeavours to save the Ship and the rest of the Cargo, on the gold in the Consul's hands ; and in the end, the matter having been investigated by persons appointed by the Russian Consul, judgment is given as to the amount which shall be contributed by the Owners of the gold to satisfy the claim for contribution in respect of the expenses. That judgment is ratified,

(1) 2 Moore's P. C. Cases (N.S.) 185.

as it was necessary it should be, by the Russian Minister at *Constantinople*, and being so ratified, and not being appealed against within a certain time, the judgment became a binding judgment upon the parties concerned. That being so, the Owners of the gold being shewn to have no alternative in order to get the gold, but to submit to the payment of this percentage, and in the meanwhile they, or some one, having given security, in the end they were obliged to pay the money themselves.

"Now, it has been contended, on the part of the Defendants, that the proceedings of the Tribunal by which this judgment was given were wrongful in many respects. In the first place, that having to apply the Russian Commercial Code, they applied the French. I think there is quite a sufficient answer to that. It appears that in matters relating to maritime law in which the jurisdiction of the Russian Consulate has to be exercised, they have not at *Constantinople* the presence and assistance of Russian Advocates to explain the law, whereas there are French Advocates resident there, and the laws of the two Countries being with reference to these matters almost the same, they had recourse to the French law, and applied it in this instance. Whether that is strictly right or wrong, I do not take upon myself to pronounce, for I think it is a matter with which we have nothing to do; but if in this case they applied the French law as a substitute for the Russian, I think we must take it that they did it with proper authority.

"Then, it is said, that they applied the law erroneously. Again, I think we have not to deal with that. We are not to sit here as a Court of appeal against any judgment pronounced by a Court which must be taken to be one of competent jurisdiction in the administration of Russian law, and whatever was substituted became for the time Russian law in respect of matters of maritime law. The proper Tribunal to appeal to, if there was any ground of appeal, was to the Court of *St. Petersburg*" (1).

With the principles of this judgment their Lordships are disposed entirely to agree. They think it must be presumed that the Greek Court rightly interpreted and applied the Greek law; that by that law they had the power, and duly exercised it, of

(1) Law Rep. 4 Q. B. 445, 446.

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deciding that, in the circumstances, *Constantinople* should be considered as the place of the Ship's destination, and the average adjusted according to the Greek law in force at that place; and that the Bottomry Bond was necessary and valid, though entered into without citing M. *Cossudi*, the Agent of the Owners of the Cargo, who was, however, their Lordships must remark, aware, as is proved by his Letter, of the arrival of the Ship in a disabled state at *Constantinople*, and, it must be presumed, of the proceedings in the Greek Court, though he did not appear and take any part in them.

It must also be presumed that the Court had power to appoint the Average or Judicial Staters, and that their decision gave authority to the Curator of the Cargo to contract the Bottomry Bond in question with *Facher*, and to tranship the Cargo on board the *Otto Sorelle;* and that this decision was rightly confirmed by the Greek Consul-General. Their Lordships do not feel themselves at liberty to enter into the discussion into which they were invited by Counsel for the Appellant, or into the question, whether the Greek law be or be not at variance with the general Maritime law upon these points. Those questions would be properly raised on appeal to the Greek appellate Court, whether sitting at *Athens* or elsewhere; and could not properly be discussed either before the Court at *Malta*, or before this Tribunal.

Their Lordships must, therefore, humbly advise Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed with costs against the Appellant.

Solicitors for the Appellant: *Redpath & Holdsworth.*
Solicitor for the Respondent: *Thomas Cooper.*

DONALD JOHNSON AND OTHERS . . . . APPELLANTS; J. C.*

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JOHN ALEXANDER BLACK . . . . . RESPONDENT. *Feb.* 1.

THE "TWO ELLENS."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Maritime lien—Admiralty Court Act, 1861, *s.* 5—*Mortgage—Assignment—Registration—Material Men—Necessaries—Priority of Mortgagee.*

The jurisdiction conferred on the High Court of Admiralty by sect. 5 of the *Admiralty Court Act*, 1861 (24 Vict. c. 10), "over any claim for necessaries supplied to any Ship elsewhere than in the port to which the Ship belongs," does not create a Maritime lien, or render the Ship chargeable for necessaries.

A British Colonial Vessel was mortgaged by her Owners to *B.* The mortgage was duly registered under the *Merchant Shipping Act*, 1854. In February, 1868, whilst lying in the Port of *London*, the Appellants, on the order of the Master, did work and furnished supplies to the Ship necessary to put her in a seaworthy condition. In July, 1868, *B.* executed an instrument transferring the mortgage to the Respondent. This transfer was without valuable consideration, and was not registered, being made to enable the Respondent to take charge of the Ship for *B.*, the Mortgagee. In the same month the Respondent took possession of the Ship. The Appellants having instituted a suit against the Ship to recover the amount due to them for the work and supplies, the Respondent intervened. At the time of the institution of the suit, the Ship was under the arrest of the Court, at the instance of two of her crew, who had instituted a cause of wages. The Owners of the Ship were domiciled in *Nova Scotia*. The Ship having been sold, the proceeds were found insufficient to satisfy the claim of the Appellants (the material men) and the Mortgage debt:—*Held* (affirming the judgment of the Court below), that the Respondent, the Assignee of the Mortgagee, was entitled to have his mortgage debt satisfied before the Appellants were paid the amount of their claim.

THIS suit was instituted for the purpose of recovering a sum of money in respect of repairs done and necessaries supplied by the Appellants to the *Two Ellens*.

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., THE LORD JUSTICE MELLISH, and SIR MONTAGUE EDWARD SMITH.

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The Respondent, who was the Defendant in the Court below, was the Transferee of a mortgage on the *Two Ellens*.

After the pleadings had been concluded an attempt was made by the parties to agree upon a special case for the opinion of the Court. A case was accordingly drawn up, but the parties not being able to finally agree upon such case, it was arranged that the statements in the case should be taken as admissions, and that evidence should be taken on the points in dispute (1).

The material facts were as follows:—

The *Two Ellens* was a British Colonial Ship belonging to the Port of *Digby*, in *Nova Scotia*, of which Vessel no Owner or part Owner was at the time of the institution of the suit domiciled in *England* or *Wales*.

On the 9th of March, 1867, the registered Owners of the *Two Ellens* mortgaged her to *Troop*, a member of the Firm of *Black, Brothers, & Co.*, of *Halifax*, for securing the repayment of an advance of $5,000 and interest made by that Firm to such Owners. The mortgage was duly registered under the *Merchant Shipping Act*, 1854.

About the month of February, 1868, the Appellants, on the order of her Master, who was also part Owner of the Ship, did certain work and furnished supplies to the *Two Ellens* whilst lying in the Port of *London*. Evidence was given that this work and supplies were necessary to enable the Ship to go to Sea.

By an instrument of transfer, dated the 16th of July, 1868, in the form prescribed by the *Merchant Shipping Act*, the Mortgagees, *Black, Brothers, & Co.*, transferred the mortgage to the Respondent. This transfer was not registered. In the same month the Respondent took possession of the *Two Ellens* on behalf of the Mortgagees.

On the 12th of February, 1869, the present suit was instituted, under the provisions of the *Admiralty Court Act*, 1861, by the Appellants against the Ship, her tackle, &c., the Respondent intervening. The Ship was under the arrest of the Court at the time when the suit was instituted at the instance of two of her crew, who had instituted a cause of wages, and had caused the Ship to be arrested.

(1) The case so prepared is set out in full in the report of this case in the Court below: Law Rep. 3 A. & E. 345.

The mortgage debt and the interest thereon still remained owing to *Black, Brothers, & Co.*, upon whose behalf bail was given by the Respondent. The Ship was subsequently put up for sale by the Mortgagees, but was bought in.

Neither *Black, Brothers, & Co.*, nor the Respondent, authorized the Master of the Ship to order the repairs and necessaries done and supplied by the Appellants, or in any way became liable to the Appellants in respect thereof.

The Ship not being of sufficient value to meet the amount due on the mortgage and the claim for necessaries, the question which arose was, whether the claim of the Appellants or the claim of the Respondent, as Assignee of the Mortgagees, was to have priority.

The Judge of the Court below (The Right Hon. Sir *Robert Phillimore*) decided in favour of the priority of the Respondent as Trustee for *Black, Brothers, & Co.*, the Mortgagees, and made a decree accordingly (1).

The appeal was from this decree.

The Admiralty Advocate (Dr. *Deane*, Q.C.), and Mr. *A. Cohen*, for the Appellants:—

The suit out of which this appeal arises was instituted by the Appellants against the *Two Ellens*, for equipping, repairing, and supplying necessaries to that Vessel; and the question for the decision of this Tribunal is, whether the Appellants are entitled to receive out of the proceeds of the sale of the Vessel their charges for necessaries supplied to the Ship, before the claim of the Respondent, the Transferee of the Mortgagees, is satisfied. The Respondent, we maintain, had no *locus standi;* he had no legal title to the Ship, because the transfer of the mortgage to him was not registered. The *Admiralty Court Act*, 1861, 24 Vict. c. 10, s. 5, confers a right to sue the Ship for necessaries supplied, unless the Owner is domiciled in *England* or *Wales;* and sect. 35 expressly enacts, that the jurisdiction conferred by the Act may be exercised either by proceedings *in rem* or *in personam: The Pacific* (2). A statutory right to proceed *in rem* implies a maritime lien, for a maritime lien is

(1) Law Rep. 3 A. & E. 345. (2) Br. & L. 243.

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the very foundation of proceedings *in rem*: *The Bold Buccleuch* (1); *The General Smith* (2); *The Brig Nestor* (3). According to general Maritime law a maritime claim has precedence, and is entitled to priority over every other Claimant. Material men had, before the Statutes, 3 & 4 Vict. c. 65, and 24 Vict. c. 10, no maritime lien: *The Neptune* (4); *Abbott* on *Shipping*, ch. 3, pt. 3, p. 116 [11th Ed. by *Shee*]. There is no question but that since these Statutes a lien for necessaries lies on the Ship: *The West Friesland* (5); *The Ella A. Clark* (6); *The Pacific* (7); *The Alexander Larsen* (8); *The St. Jago de Cuba* (9). The Admiralty Court now has jurisdiction, though it was formerly denied by the Common Law Courts: *Hoare* v. *Clement* (10). The Respondent, or those he claims under, are estopped from denying that he or they authorized the Master to give the Appellants the orders in respect of which this claim arises, they having received the benefit of the work, supplies, and necessaries to the Ship in respect of which the Appellants' claim accrued.

Mr. *Butt*, Q.C., and Mr. *E. C. Clarkson*, for the Respondent:—

The Respondent had sufficient *locus standi* to entitle him to defend the suit; he was the Transferee of a registered mortgage from the Owners of the Vessel. An unregistered transfer is valid as between Transferor and Transferee: *The Merchant Shipping Act*, 1854 (17 & 18 Vict. c. 104, sects. 55, 57); *Williams* v. *Allsup* (11); *The Spirit of the Ocean* (12). The Appellants could have no right to proceed against the Ship, unless under the 4th and 5th sections of the *Admiralty Court Act*, 1861. Those sections are in *pari materiâ* with the 24 Vict. c. 10, s. 5, and must be read in connection with the 11th section of the former Act. Under the 4th section the Court has jurisdiction over a claim for building, equipping, or repairing, only in cases where at the time of the institution of the cause the Ship is under arrest. By the 11th section of the 24 Vict.

(1) 7 Moore's P. C. Cases, 267.
(2) 4 Wheaton's Amr. Rep. 433.
(3) 1 Sumner, Amr. Rep. 73.
(4) 3 Hagg. Ad. Rep. 129; S. C. on appeal, 3 Knapp, P. C. Cases, 94.
(5) Swa. 454.
(6) Br. & L. 32.
(7) Ibid. 243.
(8) 1 W. Rob. 288.
(9) 9 Wheaton's Amr. Rep. 416.
(10) 2 Show. 338.
(11) 10 C. B. (N.S.) 417.
(12) Br. & L. 336.

c. 10, s. 5, the Court has jurisdiction over any claim in respect of any mortgage duly registered under the *Merchant Shipping Act*, 1854. The Claimant under the 4th section has no right, therefore, to institute a suit until the Ship has been arrested at the instance of some other Suitor. A registered Mortgagee, under the 11th section, may arrest the Ship. The Act gives such Mortgagee a maritime lien, and there is nothing in the Act which provides, or from which it can be inferred, that the relative positions of a Claimant in respect of repairs or necessaries done or supplied to a British or a British Colonial Ship, and a Mortgagee thereof, were intended to be altered or affected, especially to the prejudice of the Mortgagee. Admitting that the Appellants had a maritime lien, yet it would not take precedence of the Respondent's mortgage. Necessaries differ from Salvage: Statute, 3 & 4 Vict. c. 65, s. 6. Neither the 4th nor 5th section gives to the Appellant in respect of repairs a maritime lien. The necessaries were supplied without the knowledge or consent of the Respondent or the Mortgagees, who are not bound by the act of the Master. It is inconsistent with a maritime lien to make, as the 5th section of the Act of 1861 does, the right of suit to depend upon the domicile of the Owners at the time of the institution of the suit. The observations of Dr. *Lushington* in *The Pacific* (1) are conclusive against any maritime lien being conferred by that section. He held that all it gave to parties in the position of the Appellants was the right under conditions to sue the Ship.

Their Lordships' judgment was pronounced by

THE LORD JUSTICE MELLISH:—

This is a suit by parties who performed necessary repairs to a Ship to obtain payment by the sale of the Ship, under the 5th section of the *Admiralty Court Act*, 1861. The question to be determined is, whether their right to be paid out of the proceeds of the Ship takes precedence of a previous mortgage on the Ship. The mortgage had been assigned to the Defendant in the suit, but it is admitted that that makes no difference in the rights of the parties.

(1) Br. & L. 243—246.

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There have been several cases in the Court of Admiralty on this point, and the decisions are to a certain extent conflicting. Dr. *Lushington* appears in the first instance to have determined the question in accordance with the decisions which had been come to under the previous Act respecting necessaries supplied to Foreign Ships, viz., that a Maritime lien was created from the time that the supplies were furnished, and that, therefore, having such Maritime lien, the party who supplied the necessaries took precedence of a Mortgagee. But in the case of *The Pacific* (1), after giving full attention to the case, and re-considering his former decision, Dr. *Lushington* came to a contrary opinion, and determined that no lien was created until the suit was commenced, and that accordingly the Mortgagee took precedence. Dr. *Lushington* again affirmed, in the case of *The Troubadour* (2), the decision he had arrived at in *The Pacific*.

In the present case the learned Judge of the Court of Admiralty thought he was bound by the previous decisions of Dr. *Lushington;* but in his judgment he acknowledged that, if the matter had been *res nova*, and he had not been bound by the previous decisions, he should himself have come to a contrary conclusion. Therefore, the question has to be determined by their Lordships, and it may be said, perhaps, that as far as authority is concerned, the authorities are very equally balanced.

It is clear that, previous to the passing of the 3 & 4 Vict. c. 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a Ship, and that the supply of such necessaries did not give any Maritime lien upon a Ship. It is perfectly true, that for many years prior to the time of *Charles* II. the Court of Admiralty had claimed, and to a considerable extent exercised, such a jurisdiction; but the Courts of Common Law in the time of *Charles* II., and subsequently, had prohibited them from exercising that jurisdiction on the ground that they never possessed it. Subsequently, in the case of *The Neptune* (3), it was decided by this Tribunal that there was no such jurisdiction. Therefore, notwithstanding this jurisdiction was practically exercised for years, it must be taken now to be conclusively the law

(1) Br. & L. 243. (2) Law Rep. 1 A. & E. 302.
(3) 1 Knapp's P.C. Cases, 94.

that the Court of Admiralty, by the law of *England*, never had jurisdiction in a suit for necessaries supplied to a Ship, and that necessaries so supplied did not give a Maritime lien upon a Ship.

The first Act which altered this state of the law was the 3 & 4 Vict. c. 65. The 6th section of that Act is in these terms:—

"Be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever, in the nature of salvage for services rendered to or damage received by any Ship or sea-going Vessel, or in the nature of towage, or for necessaries supplied to any Foreign Ship or sea-going Vessel, and to enforce payment thereof, whether such Ship or Vessel may have been within the body of a County or upon the high Seas at the time when the services were rendered, or damage received, or necessaries furnished in respect of which such claim is made."

In the construction of this section it has been held in several cases in the Court of Admiralty that there is a Maritime lien in the case of supplies and necessaries furnished to a Foreign Ship; and their Lordships do not mean to intimate any doubts as to the validity of those decisions; but they are of opinion, that those decisions may be supported upon the ground that, though it is perfectly true that the only words used in the section are "that the High Court of Admiralty shall have jurisdiction"—which words seem hardly sufficient in themselves to create a Maritime lien—yet, looking at the subject-matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of a Maritime lien. These are strong grounds for holding that, as respects salvage and as respects collision, which already gave a Maritime lien when they occurred on the high Seas, it was intended that they should also, when they occurred in the body of a County, equally give a Maritime lien; and that being so as to Salvage and collision, it might be well said that, "necessaries" immediately following, it was intended that the same rule should apply in the case of necessaries.

That being so, the case then comes to the decision of the Statute in question; and it may be observed, that the mortgage of Ships is a security which is well known, and which has existed in this

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Country for many years. It is quite clear that, according to the decisions of the Courts of Common Law, and according to the express provisions of the *Merchant Shipping Act*, which say that a Mortgagee is not to be deemed an Owner except for the purpose of enforcing his security, a Mortgagee was never liable at Common Law for supplies furnished to the Mortgagor, while the Mortgagor continued in possession of the Ship.

Then the question is, did the Legislature intend to alter that rule, and to say that, in certain cases specified in the 6th section, instead of the Mortgagee having precedence over the Material man who had furnished supplies to the Ship on the credit of the Mortgagor remaining in possession, that rule should be altered, and that the Material man should take precedence?

Now, if the rights of different classes were to be altered, one certainly would expect that such an alteration should be expressed in tolerably clear terms. The 4th section, which begins this subject, says this:—

"The High Court of Admiralty shall have jurisdiction over any claim for building, equipping, or repairing of any Ship, if at the time of the institution of the cause the Ship or the proceeds thereof are under the arrest of the Court."

It is admitted by Dr. *Deane*, and their Lordships think it is quite clear, that that 4th section does not give any Maritime lien, because it only gives jurisdiction in respect of "any claim for building, equipping, or repairing of any Ship, if at the time of the institution of the cause the Ship is under arrest of the Court, or the proceeds thereof." Now, it certainly would be absurd to say that the question, whether the Mortgagee is or is not to take precedence over a person who had either built or repaired or equipped a Ship, should depend upon the accidental circumstance, whether some third person had happened to commence a suit in the Court of Admiralty and arrest the Ship. That would certainly be a most irrational construction, and, therefore, it seems clear that that section at any rate does not give any Maritime lien, but merely entitles the person who has done the repairs or built the Ship to be paid out of the proceeds, in preference at any rate to the Owner, to whom the proceeds would otherwise be given up.

The 5th section, which immediately follows, is:—"The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any Ship elsewhere than in the port to which the Ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any Owner or part Owner of the ship is domiciled in *England* or *Wales*."

The question is, does that give a maritime lien? Dr. *Lushington*, in the case of *The Pacific* (1) and in the case of *The Troubadour* (2), has decided that it does not, for a reason which appears to their Lordships by itself to be amply sufficient, namely, that the jurisdiction of the Court of Admiralty is not made by this section to depend upon what is the state of things at the time when the supply is furnished, but is made to depend upon what is the state of things at the time when the suit is instituted; namely, whether there is at that time an Owner of the Ship domiciled in *England*. It is contended on the part of the Appellants that the Maritime lien attaches directly the supplies are furnished. But suppose that there is an Owner at the time domiciled in *England*, then it is clear that the Court of Admiralty has no jurisdiction; and how can the Maritime lien attach if things had not happened which gave the Court of Admiralty any jurisdiction over the matter at all? How can it be said that there is something inherent in the Ship which constitutes a charge on the Ship when there is actually no mode of enforcing it at all, and the Ship is perfectly free from it? Therefore, in that case it does not attach.

Suppose the Owner leaves *England*, and becomes domiciled elsewhere, does it then attach? And suppose he comes back again, does it cease to attach? It appears to their Lordships that it is altogether inconsistent that a Maritime lien should exist on Monday, and should not exist on Tuesday, and should then revive on Wednesday. A Maritime lien must be something which adheres to the Ship from the time that the facts happened which gave the Maritime lien, and then continues binding on the Ship until it is discharged, either by being satisfied or from the laches of the Owner, or in any other way by which, by law, it may be discharged. It commences and there it continues binding on the Ship until it comes to an end. It would involve this absurdity,

(1) Br. & L. 243. (2) Law Rep. 1 A. & E. 302.

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that the rights of all other parties would be shifted according as this Maritime lien existed or not, as in the instance which has been put during the argument, if goods were sold to a Shipowner who was an Englishman, and domiciled and resident in *England*, then of course the man who so repaired or furnished supplies for the Ship has no remedy at all by law except a personal action against the Owner. Suppose that man becomes Bankrupt, then he has no remedy except to prove against his estate. The Trustee sells his Ship, as he must do under the bankruptcy. If he sells it to a man who is also an Englishman living in *England*, then no right accrues, and he is left solely to his remedy against the Bankrupt. But, if at any time, within six years I presume, when it may be barred by the *Statute of Limitations*, and I do not know whether that would make any difference, yet if at any future time that Ship becomes the property of a man who happens to be domiciled in the Colonies, then it is said the right is to attach to it, and it may be seized against anybody, and all the interests of the real Owners of the Ship at that time may be sacrificed for the purpose of paying the man who had simply furnished supplies on the credit of an Owner who became Bankrupt.

Therefore, their Lordships think it is quite sufficient to say that, according to the true construction of this section, the *res*, the Ship, does not become chargeable with the debt for necessaries until the suit is actually instituted, and that all valid charges on the Ship to which any person other than the Owner of the Ship who is liable for the necessaries is entitled must take precedence.

Their Lordships, therefore, will humbly recommend Her Majesty that this appeal be dismissed with costs.

Solicitors for the Appellants: *Westall & Roberts.*
Proctors for the Respondent: *Dyke & Stokes.*

DAVID DUNCAN AND OTHERS . . . . . APPELLANTS;

AND

DANIEL AUGUSTUS KÖSTER . . . . . RESPONDENT.

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Feb. 2, 3, 6, 7, 8, 21.

THE "TEUTONIA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Freight—Non-delivery of Cargo—Imminence of War—Deviation—Reasonable delay—Charterparty, construction of.

The Master of a Prussian Vessel, a subject of the King of *Prussia*, having on board a cargo of nitrate of soda (contraband of War) under a Charterparty and Bill of lading from *Pisagua*, bound to *Cork*, *Cowes*, or *Falmouth*, for orders to proceed to any safe port in *Great Britain* or on the Continent between *Havre* and *Hamburgh*, both included, and there deliver the cargo, "the act of God, the Queen's enemies, fire, and all and every other risk, dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted"; arrived at *Falmouth* on the 10th of July, 1870, and received orders on the 11th of that month to proceed to the French port *Dunkirk*, and there deliver her cargo. On the Ship's arrival off *Dunkirk* on the 16th, the Master was informed by a French Pilot that War had broken out between *France* and *Prussia*, whereupon the Master put back to the *Downs* to make inquiries, and anchored there on the 17th, which was Sunday. On the 18th, having telegraphed to the Owner of the Vessel for instructions, he was ordered not to go to *Dunkirk*, and on the 19th he put into *Dover*, where he was informed, as the fact was, that War, which had been imminent from the 10th, had been declared between *France* and the *North German Confederation*, formal declaration thereof having been given as upon the 19th of July:—

Held (affirming the decision of the Admiralty Court), that the Master was justified in putting back to the *Downs* for the purpose of ascertaining whether War had been declared, and was guilty of no improper deviation or delay in not returning to *Dunkirk* before the 19th of July, when War was actually declared:

Held, further, that the Master committed no breach of contract in refusing to deliver the Cargo at *Dunkirk*, and as the Charterparty provided what freight was to be paid if the Cargo was delivered, the delivery at *Dover*

* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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was within the terms of the Charterparty, and the Master was entitled to freight for the Cargo from the Owners before delivery thereof.

Semble :—Where a Master receives credible information that if he continues in the direct course of his voyage his Ship will be exposed to some imminent peril, as from Pirates, or Icebergs, or other dangers of navigation, he is justified in pausing and deviating from the direct course, and taking any step that a prudent man would take for the purpose of avoiding the danger.

THIS cause was instituted under the 6th section of the *Admiralty Court Act*, 1861, by the Assignees of a Bill of lading of the Cargo of the *Teutonia*, against that Ship and freight, and her Owners, who intervened, to recover damages for a breach of contract in not delivering her Cargo at *Dunkirk*, according to the terms of the Charterparty, and for not delivering the Cargo to the Consignees at *Dover*, the Master refusing to deliver the Cargo except on payment of freight.

The *Teutonia* was a German Vessel, the Owners, as well as the Respondent and the Master of the *Teutonia*, were German subjects of the then King of *Prussia*, and now the Emperor of *Germany*.

In the month of April, 1870, whilst the *Teutonia* was lying in the port of *Pisagua*, Messrs. *Sawers, Duncan, & Co.*, caused to be shipped on board that Ship certain goods, consisting of 2,742 bags of nitrate of Soda, to be carried in the Ship from *Pisagua* to *Cork, Cowes*, or *Falmouth*, for orders, and thence to a port as ordered, upon the terms of the following Bill of lading :—

"Shipped in good order and well-conditioned, by *Sawers, Duncan & Co.*, of *Valparaiso*, upon the Ship *Teutonia*, whereof *Köster* is Master for this present voyage, and now lying in the port of *Pisagua*, and bound for *Cork, Cowes*, or *Falmouth*, for orders, 2,742 bags, weighing in all 7,623 quintals net Spanish weight, being marked and numbered as per margin, to be delivered in the like good order and well-conditioned at port of discharge, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the Seas, rivers, and navigation, of whatever nature and kind soever excepted, unto Messrs. *Fox, Duncan, & Co.*, or assigns. Freight for the said goods to be paid as per charterparty with primage and average accustomed. In witness whereof the Master or purser of the said Ship or Vessel hath affirmed to

three Bills of lading, all of this tenor and date, the one of which Bills being accomplished, the others to stand void. Dated in *Pisagua*, this 5th day of April, 1870."

The Ship, with the goods on board, proceeded to *Falmouth* for orders; and the Appellants then ordered her to proceed with the Cargo to the port of *Dunkirk*, and there deliver the same. She accordingly proceeded to *Dunkirk*, and arrived off that port at about midnight of the 16th of July, 1870, when the Vessel was boarded by a French Government Pilot, who informed the Master that War had been declared between *France* and *Germany*. The *Teutonia* could not have entered the port of *Dunkirk* until the afternoon of the next day, there not being enough water to allow of her passing the bar.

On receiving this information from the Pilot, the Master of the *Teutonia*, who had previously heard that War was imminent between *France* and *Germany*, thought it prudent and proper to proceed with his Ship to the *Downs*, in order to make inquiries; and anchored off there on Sunday morning the 17th of July, 1870. He then telegraphed to the Owners of the Ship, and having received a telegram in reply on the 19th of July, took his Vessel into *Dover Harbour*, which was the nearest and safest place for the Ship to put into. He was there told by the German Consul, that on the 18th of July War had been declared between *France* and *Germany*.

The Appellants did not order the Ship to proceed to any other port but *Dunkirk*, and as the Appellants never tendered to the Master of the Ship the freight mentioned in the Bill of lading nor any proper *pro ratâ* freight, he refused to deliver to them the Cargo at *Dover*.

The cause was instituted by the Appellants against the Ship to recover damages on account of the Ship not having proceeded with the Cargo to *Dunkirk*, and not having delivered the same to the Appellants without payment of freight.

The cause was heard, and on the 28th of March, 1871, the Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*) gave judgment, dismissing the Appellants' suit with costs (1).

(1) Law Rep. 3 A. & E. 394.

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Mr. *Butt*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants:—

This suit is instituted under the 6th section of the *Admiralty Court Act*, 1861, which gives the High Court of Admiralty jurisdiction over claims by the Owner, Consignee, or Assignee of a Bill of lading of goods carried in any Ship into any port in *England* or *Wales*, for damage done to such goods by the negligence, or misconduct, or breach of duty or of contract of the Owner, Master, or crew of such Ship, unless such Owner is domiciled in *England* or *Wales*. Thus allowing an action against the Ship, or proceeding *in rem*, where there was practically no Common law remedy for damage or breach of contract regarding the Cargo, from the causes specified. It is of such a breach of contract that we complain here, and took proceedings below. Admitting, that if War had actually broken out between *France* and *Prussia* at the time the Master of the *Teutonia* refused to proceed to *Dunkirk*, his refusal would have been justified; we say that at the time the orders were given to the Master to proceed to *Dunkirk*, the parties were in the same position as if *Dunkirk* had been the only port named in the Charterparty and Bill of lading. The Master's sailing, therefore, to the *Downs*, and thence to *Dover*, was a breach of contract not warrantable by the state of things at the time. The evidence shews that War was not formally declared before the 19th of July, whereas, the Master could, and was bound to, have entered the port of *Dunkirk* on the 17th, and the Cargo might have been delivered on the 18th. The only proper evidence of the date of the commencement of hostilities between two Foreign States is the declaration of War transmitted by a British Ambassador to the Secretary of State in this Country: *Thelluson* v. *Cosling* (1). Diplomatic correspondence is not sufficient, *Rex* v. *Franklin* (2), much less mere rumour, which the Master acted on: *Aitkinson* v. *Ritchie* (3). There was no declaration of War until the 19th of July, when War was formally declared by the French Government. Such declaration was the only evidence of the existence of War, *The Eliza Ann* (4), and would have made the completion of the

(1) 4 Esp. 266.
(2) 17 How. St. Tr. 638.
(3) 10 East, 530.
(4) 1 Dod. 244.

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contract by the Master illegal: *The Nayade* (1). But the Cargo, instead of having been delivered at *Dunkirk*, as it ought to have been, before that day, was by the breach of contract by the Master carried into *Dover*, and the Appellants were entitled to the goods without payment of freight: *Abbott* on Shipping, p. 453 [11th Ed.]; *Parsons* on Shipping, vol. i., p. 329; *Esposito* v. *Bowden* (2); *Tindall* v. *Taylor* (3); *Reid* v. *Hoskins* (4). Where the original contract is ended, the acts of the parties must raise an implied contract before freight can become due: *Osgood* v. *Groning* (5); *The Soblomstem* (6); and there is no authority for giving a *pro ratâ itineris* freight: *The Newport* (7); *The Fortuna* (8); which would be an exercise of an equitable jurisdiction not given by sect. 6 of the *Admiralty Court Act*, 1861. The Court of Admiralty can only exercise a Common law jurisdiction, *The Don Francisco* (9), unless an equitable jurisdiction is conferred on it, which is not given by the 6th section of the *Admiralty Court Act*, 1861.

Mr. *Milward*, Q.C., and Mr. *A. Cohen*, for the Respondent:—

The judgment of the Judge of the Court of Admiralty is the only one that could have been pronounced in the circumstances of the case. The question is not when the War actually broke out, but whether at the time when the *Teutonia* was off *Dunkirk*, and the Master was informed by the Pilot that War was likely to be declared, though it had not been actually declared, between *France* and *Prussia*, it was so imminent as to justify the Master's abstaining from entering the port at *Dunkirk*. A state of War may exist independently of, and prior to, a declaration of War: *The Nayade* (1); *The Ariel* (10); *Phillimore's* Comm. on International Law, vol. iii., ch. v., li. Apprehension of danger, if founded upon reasonable information, would justify the deviation or delay on the part of the Master: *Parsons*, Law of Shipping, vol. ii., 299-300-1; 1 *Phillips* on Insurance, No. 1023; *Arnould* on Marine Insurance, vol. i., 470 [4th Ed.]; *Driscol* v. *Passmore* (11); *Post* v. *Phœnix*

(1) 4 Rob. 251.
(2) 7 E. & B. 763.
(3) 4 E. & B. 219.
(4) 6 E. & B. 953.
(5) 2 Camp. 398.
(6) Law Rep. 1 A. & E. 293.
(7) Swa. 335.
(8) 1 Edw. 56.
(9) Lush. 468.
(10) 11 Moore's P. C. Cases, 119–129.
(11) 1 B. & P. 200.

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Insurance Co. (1). Here the information given by the French Pilot at *Dunkirk* and the general rumour of War were sufficient to justify, first the Vessel going to the *Downs*, and then the sailing into *Dover* harbour. The evidence tends to shew that if a state of War did not exist on the 16th of June War was imminent, and it certainly did exist on the 19th. The 17th of June was a Sunday, when no information could be obtained. A reasonable delay was, therefore, justifiable, and there was no breach of the contract before the actual performance of it became illegal: *Parsons*, Law of Shipping, vol. ii., p. 332; *Pole* v. *Cetcovitch* (2); *Avery* v. *Bowden* (3). It was the act of the Appellants in naming *Dunkirk* only for delivery of the cargo that rendered the performance of the contract impossible. The performance of the contract having been prevented by the War between *France* and *Prussia*, the Master was entitled to refuse to deliver up the goods without payment of freight: *Maclachlan* on Shipping, pp. 405-407; *Shield* v. *Wilkins* (4); *Tindall* v. *Taylor* (5). If the order to deliver at *Dunkirk* became in the state of circumstances rescinded, there was substantially no order, and the Master was entitled to put into any port within the terms of the charterparty: *Sieveking* v. *Maas* (6). If a voyage is interrupted there may be a claim *pro ratâ* for freight: *Curling* v. *Long* (7); *Luke* v. *Lyde* (8); and freight is due even when the Master has lost some of the goods by his own negligence: *The Norway* (9). In *The Hoop* (10) freight and expenses were decreed to the Master, although the contract was illegal and dissolved. The same principle as to freight *pro ratâ itineris* is recognised by the Scotch Law: *Wilson* v. *Bennett* (11); *Bell's* Princ. of the Law of *Scotland*, §§ 425-6.

1872 *Feb.* 21.

Judgment was reserved and now pronounced by

THE LORD JUSTICE MELLISH:—

This is an appeal in a cause instituted under the 6th section of

(1) 10 Johnson's N. Y. Sup. Ct. Rep. 78.
(2) 9 C. B. (N.S.) 430.
(3) 5 E. & B. 714.
(4) 5 Ex. 304.
(5) 4 E. & B. 219.
(6) 6 E. & B. 670.
(7) 1 B. & P. 634.
(8) 2 Burr. 882.
(9) Br. & L. 377.
(10) 1 Rob. 196.
(11) 10 March, 1809, 15 Fac. Decis. 251.

the *Admiralty Court Act*, 1861, on behalf of Messrs. *Duncan, Fox, & Co.*, the Consignees of a Bill of lading of the Cargo laden on board the Ship *Teutonia*, against that Ship and her freight, and against the Owner of the Vessel.

The *Teutonia* was a Prussian Brig, subject to the laws of *Prussia*, and her Master and crew were subjects of the King of *Prussia*. The Bill of lading, dated the 5th of April, 1870, was as follows: [His Lordship read the document, *ante*, p. 172.]

And by the charterparty referred to in the Bill of lading it was agreed that, "after receiving on board the said Cargo, the said Vessel shall proceed either to *Cork*, *Cowes*, or *Falmouth*, at the option of the Master, where he shall receive orders from Charterers' Agents within three days after his arrival to proceed to any one safe port in *Great Britain* or on the Continent between *Havre* and *Hamburgh*, both included, and there, according to Bills of lading and Charterparty, deliver the Cargo. Freight to be paid in manner herein mentioned on a true and right delivery of the Cargo in the port of discharge at and after the rate of 45*s.* British sterling per ton."

The Vessel arrived at *Falmouth* on the 10th of July; and the Master, whilst there, heard rumours that War was probable between *France* and *Prussia*. On the 11th of July, the Master received orders from the Consignees to discharge the cargo at *Dunkirk*; and he at once set sail for *Dunkirk*, and arrived at a distance of about fourteen miles off that port, at 12 o'clock at night of the 16th, which was a Saturday; and the Master says that, after laying-to for about two hours, a regular Pilot, in official uniform, came on board; that he asked the Pilot about the War; that the Pilot told him it had been declared two days ago; that he asked the Pilot where he could bring-to in safety, so that he might ascertain whether War was actually declared or not; that the Pilot offered to take him to *Flushing*, or the *Downs*, or wherever he liked. The Master elected to go to the *Downs;* and he anchored there on Sunday morning, the 17th, at 10 o'clock. He says, that on that day he could obtain no advice or information; that on the Monday, the 18th, he was on shore at *Deal*, and the German Consul told him that War had broken out. He telegraphed to the Owner, who was his Father, and received an answer, forbidding

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him to go to *Dunkirk;* and on Tuesday the 19th he took the Ship into *Dover*, as the nearest port. On the same 19th of July the French declaration of War was delivered to the Prussian Government at *Berlin*, which was known the same day by telegraph in *England*. On the 23rd of July, an Agent of the Plaintiffs went to *Dover*, and required the Master to proceed to *Dunkirk*, which he refused to do. Afterwards, on the 1st of August, the Plaintiffs required the Master to deliver them the Cargo at *Dover*, which he refused to do unless he was paid his freight.

Under these circumstances, the Plaintiffs allege, that the Master has committed two breaches of contract or duty; first, in refusing to proceed to, and deliver the Cargo at, *Dunkirk;* and, secondly, they complain that, when the performance of the contract became impossible, and the contract was, as they allege, dissolved by the War, the Master was not justified in refusing to deliver the Cargo to the Plaintiffs at *Dover* without payment of freight.

The first question to be considered is, whether the Master was bound to have entered the port of *Dunkirk* on the 17th of July; and on that question, the learned Judge in the Court below has found that, on the 16th of July, the *Teutonia* could not have entered the port of *Dunkirk* with her Cargo without being exposed to the penalties of trading with the enemy of her Country; but that, if this was an erroneous application of the law to the facts at that date, the circumstances justified the Master in pausing and making further inquiries as to the existing relations between his own Country and *France*, and that he did not exceed the limits of a reasonable time in making the inquiry. Their Lordships have great difficulty in agreeing with the learned Judge that the *Teutonia* could not have entered *Dunkirk* without being exposed to the penalties of trading with the Enemy of its Country on the 16th of July. There does not appear to their Lordships to be any satisfactory evidence that a state of War existed between *France* and *Prussia* prior to the 19th of July. Their Lordships do not think that either the declaration made by the French Minister to the French Chambers on the 16th of July, or the telegram sent by Count *Bismarck* to the Prussian Ambassador in *London*, in which he states that that declaration appears to be equal to a declaration of War, amounts to an actual declaration of

War. And though it is true, as stated by the learned Judge, that a War may exist *de facto* without a declaration of War, yet it appears to their Lordships that this can only be effected by an actual commencement of hostilities, which, in this case, is not alleged.

It is, however, unnecessary further to consider this part of the case, because their Lordships agree with the learned Judge that the Master of the *Teutonia*, when he was informed, on his arrival off *Dunkirk*, by the Pilot, although incorrectly, that War had been actually declared two days before, was entitled to pause and to take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries.

If the Master had entered *Dunkirk*, and it had turned out that War had been previously declared, he would have entered it with notice that he was entering an enemy's port, and this would have obviously exposed his Ship to condemnation, and might have exposed himself to severe penalties when he returned to his own Country. It seems obvious that, if a Master receives credible information that, if he continues in the direct course of his voyage, his Ship will be exposed to some imminent peril, as, for instance, that there are Pirates in his course, or Icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of *Pole* v. *Cetcovitch* (1) is an authority in point. It was argued, however, on the part of the Appellants, that, to justify this course, both Ship and Cargo must be exposed to a common peril, whilst in the present case the Cargo, being the property of a neutral Owner, would have been in no danger from being carried into a French port, and it was argued that though a Master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which both Ship and Cargo were exposed, although it might afterwards turn out that the information upon which the Master acted was incorrect, yet that if the reported danger was a danger to the Ship alone, the Master would commit a breach of contract by deviating from the direct course of the

(1) 9 C. B. (N.S.) 430.

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voyage unless the danger actually existed, and the Master could allege that he was prevented by one of the perils excepted in the Bill of lading from pursuing his voyage in the direct course. It appears to their Lordships, however, that there is no sound ground for this distinction; if the Cargo had been a Prussian Cargo it would have been exposed to the same danger as the Ship from entering the port at *Dunkirk*, and it appears to their Lordships that when an English Merchant ships goods on board a Foreign Ship, he cannot expect that the Master will act in any respect differently towards his Cargo than he would towards a Cargo shipped by one of his own Country, and that it cannot be contended that the Master is deprived of the right of taking reasonable and prudent steps for the preservation of his Ship, because from the accident of the Cargo not belonging to his own nation, the Cargo is not exposed to the same danger as the Ship. On the whole, therefore, their Lordships are of opinion, on this part of the case, that the Master was justified in going to the *Downs* for the purpose of ascertaining, whether War had actually been declared; and they also entirely agree with the opinion of the learned Judge, that the Master was guilty of no unreasonable delay in not returning to *Dunkirk* before War was actually declared on the 19th of July.

The next question to be determined is, whether the Owner of the Ship is liable in damages because the Master did not deliver the goods to the Plaintiffs at *Dover*, and this depends on the further question, whether the Master was bound to deliver the Cargo at *Dover* without any payment in respect of freight. As neither party has relied on the law of *Prussia* in the pleadings, or given any evidence respecting that law, the question must be decided according to the law of *England*.

The learned Judge came to the conclusion that, although the Cargo had not been carried to or delivered at the port of destination, and although, therefore, the Shipowner was not entitled to the freight agreed to be paid by the Bill of lading and the charter-party, nevertheless, that he was entitled to some payment of freight, either *pro ratâ itineris*, or by way of compensation for the carriage of the goods from *Pisagua* to *Dover*. It was argued, however, before us on the part of the Respondent, that, under the

circumstances, the Shipowner was entitled to be paid the freight which, according to the Bill of lading and the charterparty, was to be paid on a delivery at *Dover*.

The argument for the Appellants assumes, that the breaking out of the War rendered the performance of the charterparty illegal, and that, therefore, the contract between the parties was dissolved; and there can be no doubt that the breaking out of the War did render it illegal for the *Teutonia* to enter any French port, but the question is, whether, under the terms of this Charterparty, the contract might not still have legally been performed by the delivery of the Cargo at some of the other ports mentioned in the charterparty as ports at which the Cargo might be delivered.

The substance of the contract between the parties is, that the Cargo may be delivered at any one of a great number of ports; that the Consignee is to have the selection of the particular port, but that he is bound to select a safe port—that is, a port at which the Master can deliver the Cargo, and earn his freight; and the question is, whether that contract is completely performed by the naming of a port at which it turns out in the event to be impossible to deliver.

In *Ogden* v. *Graham* (1) it was held by the Court of Queen's Bench, that the Charterer, under a charterparty framed like this, committed a breach of contract by naming a port which was closed by the order of the Government of the Country at the time he named it; and this case is a direct authority that, if the War had broken out before the Consignee gave orders for the Master to proceed to *Dunkirk*, the Consignee would have been bound to name some other port than a French port as the port of discharge. It was, indeed, argued that, as it was known at the time when the orders were given at *Falmouth* that there was great danger of War breaking out between *France* and *Germany*, *Dunkirk* was not even then a safe port, and that the Charterer had no right to order the Master to proceed there. Their Lordships, however, are not of that opinion. They think that, until the War was actually declared, the Consignee was entitled to require the Master to proceed to *Dunkirk*; and it is to be observed that the Master, when he received the orders, made no objection to them, but proceeded on his voyage to

(1) 1 B. & S. 773.

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Dunkirk. The question to be determined is, what is the effect of the named port becoming a closed port by reason of War breaking out between the time when the orders are given and the time when the Ship arrives? As their Lordships have already given their opinion that the Master was guilty of no improper deviation or unreasonable delay in proceeding to *Dunkirk*, they think the case, as to this branch of it, is exactly the same as if the War had already broken out when the Vessel first arrived off *Dunkirk*. Now, on the one side it is contended that, when once the Consignee has named a port which is an open and proper port at the time he names it, the Bill of lading and charterparty are to be read exactly as if this was the only port of discharge named in them; on the other side it is contended that, assuming the Consignee committed no breach of contract in giving orders to the Master at *Falmouth* to proceed to *Dunkirk*, yet, nevertheless, as in the event it turned out to be impossible for the Master to deliver at *Dunkirk*, the Consignee had not completely performed his part of the contract to name a port at which the Cargo could be delivered, and that he was bound to select another port from among those named in the Charterparty.

There is no authority on the proper construction of the charterparty in this respect, but their Lordships are of opinion, that they ought not to hold that the contract between the parties has become impossible of performance, and is, therefore, to be treated as dissolved, if by any reasonable construction it can be treated as still capable, in substance, of being performed.

Although it is true that the Court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties; and it would seem very unjust to hold, because the Consignee has named a port at which, without any fault on the part of the Shipowner, it is impossible for the Cargo to be delivered, that, therefore, the Consignee is entitled to the possession of the Cargo at the nearest neighbouring port, which, in a charterparty framed like this, must necessarily be one of the ports named in the charterparty, without paying for the Cargo any freight whatever. The Ship, without

any breach of contract on the part of the Shipowner, has arrived at *Dover;* the Consignee has required the Master to deliver him the Cargo there, and he has not required the Master to proceed to any other port except *Dunkirk*, where it was impossible for him to go. The charterparty provides what freight is to be paid if the cargo is delivered at *Dover*, and how it is to be paid; and, therefore, it appears to their Lordships, that they ought to hold that the contract was not dissolved by the impossibility of delivering the Cargo at *Dunkirk*, and that the Shipowner had not lost his chartered freight, nor his lien for it, at the time when the Cargo was demanded at *Dover*.

Their Lordships having come to the conclusion that the Shipowner had still a lien for the full freight, it becomes unnecessary to consider whether, if *Dunkirk* had been the only port of discharge, the Shipowner would have been entitled either to freight *pro ratâ itineris*, or to a sum by way of compensation for the carriage of the goods from *Pisagua* to *Dover*, and they wish to be understood as giving no opinion on these questions, which, no doubt, are questions of great difficulty and importance.

On the whole, their Lordships will recommend to Her Majesty that the appeal should be dismissed with costs (1).

Solicitors for the Appellants: *Hillyer & Fenwick.*
Solicitors for the Respondent: *Thomas & Hollams.*

(1) See *Geipel* v. *Smith*, Law Rep. 7 Q. B. 404.

J. C.* 1872 *Feb.* 8, 9.

FRANCIS HART DYKE, Esq., Her Majesty's Procurator-General, on behalf of Our Sovereign Lady the Queen . . . . . } Appellant;

AND

HENRY WILLIAM ELLIOTT, AND THE OWNERS OF THE STEAM-TUG OR VESSEL "GAUNTLET" . . . . . } Respondents.

THE "GAUNTLET."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Foreign Enlistment Act, 1870 (33 & 34 *Vict.* c. 90, ss. 8, 30)—*Construction—Naval Service—Employment of English Steam Tug to tow Prize of War—Forfeiture—Court of Admiralty—Crown—Costs.*

A French Ship of War captured in the *English Channel* a Prussian Ship as prize of war. A prize crew under a French naval Officer was put on board. The prize Ship being driven by stress of weather into the *Downs*, anchored within British waters, and after lying there two days the French Consul at *Dover* engaged an English Steam-tug, then lying in the *Downs*, to tow the captured Ship from British waters to a port of the Captors and under such agreement the Tug towed the prize to *Dunkirk Roads*. In a suit instituted on behalf of the Crown for condemnation of the Tug for violation of the *Foreign Enlistment Act* of 1870 (33 & 34 Vict. c. 90), the Judge of the Court of Admiralty held, that no offence had been committed under that Statute, as the Steam-tug was not employed in the military or naval service of *France*, as declared by the 8th section of the Act, and dismissed the suit, condemning the Crown in costs. On appeal, *Held*, by the Judicial Committee (reversing such decree), that the engagement by the Owners of the Tug for the express purpose of towing the detached prize crew, its Prisoners and prize Vessel, speedily and safely to French waters, where the Prisoners and prize would be taken charge of by the French authorities, and the prize crew set free, was despatching a Ship, within the meaning of sect. 8 of the *Foreign Enlistment Act* of 1870, for the purpose of taking part in the naval service of a belligerent, and condemned the Tug as a forfeiture to the Crown.

Whether a Court of Admiralty has power, under the *Foreign Enlistment Act*, 1870, to condemn the Crown in costs, *Quære.*

THE appeal in this case was brought from a decree of the High Court of Admiralty in a cause instituted under the provisions of

* *Present*:—Sir James William Colvile, The Lord Justice James, The Lord Justice Mellish, and Sir Edward Montague Smith.

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the *Foreign Enlistment Act*, 1870, by the Appellant against the British Steam-tug the *Gauntlet*, her tackle, apparel, and furniture, and against all persons in general having any right, title, or interest in the Steam-tug, her tackle, apparel, and furniture.

The *Gauntlet* had been previously arrested at the instance of the Crown, and released on bail.

The Appellant, by his petition, alleged that on the 24th of November, 1870, the Prussian Ship *Lord Brougham*, of the port of *Hamburg*, having been then lately captured and taken on the high Seas by a French Vessel of war, as a prize of war, arrived and was anchored in the *Downs*, within three marine miles of the coast of *England*, being in the possession of the Government of *France*, and in charge of a French prize crew. That on the same day an agreement was entered into between *Mumford*, one of the Respondents, and *M. Le Sauret*, the French Consul at *Folkestone*, whereby, in consideration of a sum of money to be paid by the French Consul-General in *London*, on behalf of the French Government, to the Owners of the *Gauntlet*, *Mumford* agreed to despatch the steam-tug *Gauntlet*, in order, or with the intent, that the Steam-tug, with knowledge, or with reasonable cause to believe, that she would be employed in the naval service of *France*, in towing the *Lord Brougham* from the place where she then was in charge of a French prize crew as such prize of war to the port of *Dunkirk*, in *France*. That on the 26th of November, and following days, *Mumford* did, in pursuance of such agreement, and without the license of Her Majesty, despatch, or cause, or allow to be despatched, the Steam-tug *Gauntlet* with the intent hereinbefore alleged; and that the Steam-tug *Gauntlet*, then being in charge of the servants of the Respondents, without the license of Her Majesty was employed in the naval service of *France* in towing, and did tow, the Ship *Lord Brougham*, then being in charge of a prize crew, or a prize of war, from within three marine miles of the shore of *England* to the port of *Dunkirk*. That during the times aforesaid *France* was a state at War with *Prussia*, and *Prussia* was a State at peace with Her Majesty, which latter facts were well known to the Respondents; and it was submitted, that by reason of the premises the Steam-tug and her equipment had, under the provisions of the *Foreign Enlistment Act*, 1870, become forfeited to Her Majesty.

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The Respondents, by their answer, denied the truth of the averments contained in the petition, and alleged that the *Gauntlet* was a Steam-tug belonging to the port of *London*, and that her ordinary employment was towing British and Foreign Vessels between *Beachey Head* and *Margate Roads* to and from all ports on the coasts of *England*, *France*, *Belgium*, and *Holland*; that she left the port of *London* on the 25th of November, 1870, for the *Downs*, for the purpose of seeking employment, and was brought up off *Deal Pier*, which was an ordinary anchorage for Steam-tugs; that after the *Gauntlet* had so brought up, and had lain there for some time, and on the 26th of November, *West*, her Master, having been informed that a person on shore was desirous of engaging the services of a Steam-tug, went on shore, and shortly afterwards he had an interview with *M. Le Sauret*, when it was arranged that the *Gauntlet* should tow the *Lord Brougham* from the *Downs* to *Dunkirk Roads* for the sum of £70, that being the usual and ordinary charge for towing a Vessel of the size of the *Lord Brougham* from the *Downs* to *Dunkirk Roads*; they denied that the sum of £70 or any other sum was agreed to be paid by the French Consul-General in *London* on behalf of the French Government, or that there was anything unusual in the circumstances under which the *Gauntlet* was so engaged; and they also denied that the *Lord Brougham* was towed to *Dunkirk*, as stated in the petition, she having been towed only to *Dunkirk Roads*; and the Respondents traversed the other averments set out in the petition, and submitted that the averments in the petition disclosed no offence against the *Foreign Enlistment Act*, 1870, as to entitle the Appellant to the condemnation prayed for in the petition.

At the hearing of the cause Witnesses were examined, and the Judge (The Right Hon. Sir *Robert Phillimore*), having reserved his judgment, on the 28th of March, 1871, decreed, that the circumstances of the case did not warrant him in pronouncing that the *Gauntlet* was forfeited to the Crown, on the ground of her having been despatched with reasonable cause of belief that she was employed in the naval service of *France*, and dismissed the petition, condemning the Crown in costs (1).

From this decree the present appeal was brought.

(1) Law Rep. 3 A. & E. 381, 394.

The *Solicitor-General* (Mr. *G. Jessel*, Q.C.), the *Queen's Advocate* (Sir *Travers Twiss*, Q.C.), and Mr. *Archibald*, for the Crown:—

First, we submit, that the *Gauntlet* was despatched in violation of the provisions of the *Foreign Enlistment Act*, 1870, and was, within the meaning of the 8th section of that Act, as interpreted by the 30th section, employed in the naval service of *France*, being engaged in towing the *Lord Brougham* to the *Dunkirk Roads*. This was a naval service by a Steam-tug. No doubt pilotage on board a belligerent Vessel is naval service, as in this case towage was. The Court below, under the 8th section of that Act, ought, therefore, on that ground, to have condemned her as a forfeiture to the Crown. In *Ex parte Ferguson* (1) it was held that the interpretation clause in a Statute does not narrow the meaning of an Act, but extends it. Here the word "include," in sect. 30, has a more extensive meaning than the word "mean," which is usually used in interpretation clauses. There can be no question that if the Tug had towed an armed Vessel in order to assist her in capturing the *Lord Brougham*, she would have been employed in a naval service within the meaning of that term in the Statute. Here she towed the prize to a French port for the purpose of condemnation. As laid down by Lord *Mansfield* in *Goss* v. *Withers* (2), a capture is where there is no just ground of hope in recovering the Ship, which becomes the property of the captor. Here, to vest the prize in the Captors, there was the necessity of condemnation, as required by French law: *Pistoyer et Duverdy, Traité des Prises Maritime*, 173, 176, 225, 229. The capture was incomplete until the *Lord Brougham* was brought within French territory and condemned by a French prize Court. The prize crew would have been entitled to share in any prize made by their Ship: *The Frederick and Mary Ann* (3). The German crew were on board the prize as Prisoners of War. No commission was necessary to make the Tug a Ship of War any more than a boat or pinnace from the Captors' Ship. The Tug clearly assisted the Captors to render the capture complete, and without her assistance the Capture might never have been completed. By getting the prize within French waters the prize

(1) Law Rep. 6 Q. B. 280. (2) 2 Burr. 685.
(3) 6 Rob. 213.

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Crew were freed from the burthen of guarding her, and at liberty to make fresh captures. As the Tug was under the command of the prize Captain, and in the service of the French, the Tug and the Ship must be considered as one. A Vessel in towage of a Tug and the Tug towing, are considered as one Vessel: *The Cleadon* (1); *The Christina* (2). The Respondents had knowledge that this was a French prize, but even if they acted in ignorance of the Statute, there was an actual "despatching" from the *United Kingdom* for the purpose of taking part in the naval service of *France* within the meaning of the Statute.

Secondly, the *Foreign Enlistment Act*, 1870, confers no power on the Court of Admiralty to give costs for or against the Crown. The 19th section confers jurisdiction in respect of forfeiture of Ships for offences against that Act, but in nowhere does it empower the Court of Admiralty to condemn the Crown in costs. It is a rule, that where there is no statutory enactment applicable, the Crown cannot be condemned in costs. Under the ordinary jurisdiction of the Admiralty Court, costs cannot be given against the Crown under the 18 & 19 Vict. c. 90, unless the Attorney-General is a party: *The Leda* (3); and so it has been held in an Excise information: *Reg.* v. *Beadle* (4); and as an example it may be urged, that it has been decided that the Court of Probate has no authority to condemn the Queen's Proctor in the costs of unsuccessful litigation: *Atkinson* v. *Her Majesty's Proctor* (5); *Wilson* v. *Wilson* (6).

The *Admiralty Advocate* (Dr. *Deane*, Q.C.), and Mr. *Edwyn Jones*, for the Respondents:—

The *Gauntlet* was not employed in the naval service of *France* within the meaning of the *Foreign Enlistment Act*, 1870. The 8th section, sub-s. 4, uses the phrase "military or naval service," and by the interpretation clause, sect. 30, the words "when engaged in naval or military service," shall, as respects a Ship, include any user of a Ship as a Transport, Store Ship, Privateer, or Ship under Letters of Marque. This, however, is the case of a Steam Tug, which is not

(1) 14 Moore's P. C. Cases, 92.
(2) 6 Notes of Cases, pp. 4, 361.
(3) Bro. & L. 19.
(4) 7 E. & B. 492.
(5) Law Rep. 2 P. & D. 255.
(6) Law Rep. 1 P. & D. 180.

included in that category, and does not fall within, any of the definitions given in that clause; which, on the contrary, narrows the general meaning of the phrases defined, and implies that a Pilot may be lawfully employed by a belligerent Vessel; and if so, *à fortiori*, a Steam Tug. What is meant by "naval service" appears from the former *Foreign Enlistment Act*, 59 Geo. 3, c. 69, s. 2. The case of *The Salvador* (1), decided by this Tribunal, shews that it must be employment in a warlike operation, and aggression against a "Foreign Prince." *The International* (2) is an authority that the service must be proved to be for a warlike purpose, and not such service as may probably be of a commercial character: *Wheaton's* Inter. Law, § 438 [8th Ed. by *Dana*]. But in this case the prize was not a Ship of War. She was within British waters, and had only the usual protection accorded to a Merchant Vessel. [THE LORD JUSTICE JAMES:—Could the captured crew on board the prize have been brought up by *habeas corpus*, or if one of the prize crew had killed one of them, have been tried here for murder?] That may be a question. A Steam-tug may be so employed in towing a Ship of War to action, as to constitute military service, but that is not the case here: the Tug was not employed to complete the capture, as that was final. It was unnecessary to take the prize into the Country of the Captors: *Phillimore's* Inter. Law, vol. iii., s. 357, p. 460; *Twiss* on the Law of Nations, vol. ii., s. 186, p. 369: *The Henrick and Maria* (3); *The Polka* (4). The Statute under which these proceedings are taken is highly penal, and must be strictly construed, and, therefore, as "Steam-tug" is not mentioned the Respondents are not within its provisions. The *Lord Brougham* was ordered off by the English authorities, and the Tug towed the prize with the cognizance of the British authorities, which is a material fact. To have towed the Vessel out of British Waters was no offence; then how can the continuance of the towage to *Dunkirk* be said to be a "naval service" within the Act?

The *Solicitor-General*, in reply:—

It is no answer to the right of the Crown to forfeiture of the

(1) Law Rep. 3 P. C. 231.
(2) Law Rep. 3 A. & E. 321.
(3) 4 Rob. 43.
(4) Spinks, 57.

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Tug, that her Owners did not intend to violate the provisions of the *Foreign Enlistment Act* of 1870, of which Act they profess to have been ignorant when they entered into the contract to tow. It is sufficient to justify the forfeiture to the Crown under that Statute that they have done so.

1872 *Feb.* 20.

Their Lordships reserved judgment, which was now delivered by

THE LORD JUSTICE JAMES:—

In this case the Crown sought the condemnation of the Respondent's Ship, the *Gauntlet*, for a violation of the *Foreign Enlistment Act*. The learned Judge of the Court of Admiralty found that there was no such violation, and dismissed the petition of the Queen's Proctor with costs.

The Crown, by the present appeal, complains of the finding and dismissal; and further, that if the decree in this respect were well founded, the Court of Admiralty had no jurisdiction to award costs against the Crown.

The facts of the case are not in dispute, and may be briefly summarised. The Respondent's Steam-tug, under an agreement with the French Consul, made by one of her Owners and the Master, left its anchorage near the *Ryde Pier* to go to a Vessel called the *Lord Brougham*, lying a few miles off in British waters, for the purpose of towing her across to *Dunkirk Roads*, and did accordingly so tow her. The *Lord Brougham* was, and was (as their Lordships have no doubt) well known to all parties concerned to be, a German merchant-ship, which had been captured by a French cruiser, and then was French prize of war. She had on board a French Officer and a French prize crew, with some of the original crew as Prisoners. The Crown contends that sending an English Steam-tug expressly for the purpose of towing a prize to the Captor's waters is dispatching a Ship from the *United Kingdom* for the purpose of taking part in the naval service of the belligerent Power, and is, therefore, within the words and plain meaning of the prohibition.

On the part of the Respondent it is urged that, at all events, there was no conscious violation of the law; that the Ship engaged in the transaction in the ordinary course of business, just as it

would have towed any other Ship across, and for the ordinary remuneration for such service; and that, in truth, the immediate cause of the hiring of the Tug was the pressure of an English authority who insisted on the prize no longer remaining in British waters. The Solicitor-General, on behalf of the Crown, did not contest what may be called the moral innocence of the Respondents, but insisted—and in their Lordships' opinion unanswerably—that parties knowing the facts constituting their act a legal offence cannot be heard in a Court of Law to allege that they were ignorant of, or had forgotten, or, what is more probable here, never thought of the law. These are matters for the indulgent consideration of the Crown, but not matters which the Court of Admiralty or this Board has any jurisdiction to deal with.

It was much pressed in the Court below, and again before their Lordships, that the statute being a penal, or, as it was phrased, a highly penal one, it was to be construed strictly. It appears to their Lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

It was contended in the Court below, but without success, that the words in the prohibitory clause were to be restricted by the words in the definition clauses, and that contention has been repeated here. In the Court below that argument was used in

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support of a contention that "Steam-tug" was not within the definition. Here, in support of the contention, that the uses are limited to the uses specifically mentioned in the definition. The words, however (as was pointed out by the learned Judge), are not "shall mean," but "shall include." In some of the clauses in the same part of the Act the other words "shall mean" are used, and in the other clauses in which the words "shall include" are used, the most absurd consequences would follow if the words "shall include" were construed as equivalent to "shall mean," *e.g.*, the clause as to what shall be included under the words "*United Kingdom.*" Indeed, as to this particular clause itself, consequences no less absurd would follow if the things included were to be considered as an exhaustive enumeration, and so as to be the only things comprised. Their Lordships have, therefore, no hesitation in concurring with the learned Judge that the words in the definition can have no effect in restricting the meaning to be put on the words of the prohibitory section. And the whole question is really what is the meaning of the words in that section "naval service."

In the Court below a good deal of the argument appears to have turned on, and a good deal of the judgment deals with, the question as to how far it is essential to the legal completion of a Captor's title by formal judicial condemnation that the prize should be brought *infra præsidia* to give the Prize Court jurisdiction to pronounce such condemnation. It does not appear material to their Lordships to consider that question. It appears to have been considered that if it had been made out that it was essential, then the act of the Steam-tug in going to tow the prize into French waters, and so *infra præsidia*, would be an act done in the naval service of the captor Power.

But it appears to have been overlooked that that is not the only way in which, nor the only object for which, service can be rendered to a belligerent in connection with a prize. It would seem to be quite as important, to say the least, to complete a capture *de facto* by lodging it in a place of safety, as to complete it *de jure* by bringing it within the jurisdiction of the captors' Prize Court.

What was the position of the *Lord Brougham* when the Defendants' Vessel undertook the towing of her to French waters. She had (subject to the possibility of escape or recapture) ceased to be a German merchantman. She certainly had not become a French merchantman. She was in the actual possession of the French Government. She was under the command of a French naval Officer, with a crew of Sailors of the French navy, temporarily detached from the French Ship of War for that purpose. The Officer and crew were still part of the Ship's crew—entitled to share in any fresh prize made by the latter—bound to share any prizes which they themselves might have made, as they lawfully might, of any German Ship coming in their way. They had in our Waters the right of a French Man-of-war, as against any action of our Municipal law, in respect either of their Prisoners or their booty. Their Lordships agree, therefore, with the contention on the part of the Crown, that it is impossible to distinguish such a Ship, because it had been a prize, from the case of a tender, or a pinnace, detached for any purpose from a Ship of War, or any other Vessel taken up by or for the belligerent Power in the course of its naval operations.

The Counsel of the Respondents contended, that naval service must mean service in or directly connected with some warlike naval operation. In their Lordships' opinion, the detaching a prize crew after capture to take charge of the prize, and to bring it and the Prisoners safely home, is essentially a warlike naval operation —as much and as important a warlike operation as the chase before the capture.

Their Lordships, therefore, have no doubt that sending an English Steam-tug for the express purpose of taking the detached prize crew, its Prisoners and booty, speedily and safely to French waters, where the Prisoners, prize, and booty would be taken charge of by the French authorities, and the prize crew set free to rejoin and strengthen their own Ship, was despatching a Ship for the purpose of taking part in the naval service of the belligerent, within the plain meaning, the words and the spirit of the Act of Parliament.

Their Lordships will, therefore, humbly recommend, that the decision of the Court of Admiralty be reversed, and that, in lieu

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thereof an order of condemnation be made as prayed by the Queen's Proctor.

On the subject of costs it is no longer the interest of the Respondent to contest the proposition of the Solicitor-General, who admits that his principle is to apply as well against as in favour of the Crown, and their Lordships have, therefore, not had the assistance of the arguments on the other side, which they would have desired to hear if it had been necessary to pronounce any decision on the point.

For the Crown: *The Queen's Proctor, F. H. Dyke.*
Solicitors for the Respondents: *Lowless, Nelson, & Jones.*

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WILLIAM HENRY SMITH . . . . . APPELLANT;

AND

THE BANK OF NEW SOUTH WALES . . RESPONDENTS.

THE "STAFFORDSHIRE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY, IRELAND.

Bottomry Bond to Ship Agents—Agreement not to enforce Bond if Bill of Exchange honoured—Port of destination where the Bond became due—Subsequent freight.

4 Mar. & S. 42
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A Bottomry Bond on a Ship and freight was given by the Master for repairs of the Ship (already subject to a mortgage), with an agreement by the Bondholder, the Ship's Agent, that if a Bill of Exchange, drawn by the Master upon the Mortgagee, should be duly honoured, the Bond should not be enforced. The Drawee died before the Bill was presented, and neither administration nor probate of his Will had been taken out, when the holder of the Bill, in ignorance of the death of the Drawee, presented the Bill for acceptance:—*Held*, that it was not necessary, in order to entitle the Bondholder to enforce the Bottomry Bond, that there should have been such a dishonour of the Bill as might have been necessary to give a right of action against a Drawee or Indorsee of the Bill, and it was sufficient that what was the

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* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

reasonable course, for the purpose of getting the Bill accepted and paid, should have been taken, which, having regard to the circumstances of the case, appeared to the Judicial Committee to be established; and the Bond held good.

The Bond on the Ship and freight was made absolute on the arrival of the Ship at *Callao*, but the Bond also hypothecated the freight to be earned by the Ship from that place to any other port or ports:—*Held*, that the Bond was good *pro tanto* as to the Ship, but void with respect to the subsequent freight earned in the voyage from *Callao* to *England*.

The case of *The Jacob* (1) commented on.

THIS was an appeal from the decree of the High Court of Admiralty of *Ireland* (2), in a suit instituted by the Respondents, to enforce payment of a Bottomry Bond for £3,265, executed at *Melbourne* by *Barrett*, the Captain of the Ship *Staffordshire*, on the Ship and freight.

The suit was defended by the Appellant, a Merchant in *London*, the Owner of 42/64ths of the Vessel. Captain *Barrett* was the Owner of the remaining 22/64ths. The Bond was executed in favour of Messrs. *Dickson & Williams*, Ship Agents at *Melbourne*, who afterwards assigned the Bond to the Respondents. The Defendant by his answer, set up as a defence that the Bond was given as a collateral security only, for the payment of certain Bills of Exchange drawn on *C. Gumm*, of the *City of London*, the Mortgagee of the Ship; that before the Bills were presented *Gumm* died; and the answer alleged that shortly after the Bills had arrived at maturity the Executors of *Gumm* had tendered the amount, but that the offer of payment had been refused. The Defendant also alleged, that the amount for which the Bond had been given had been raised without pressing necessity, and without communication with the Defendant in *England*.

The facts were as follows:—

The *Staffordshire* sailed from *London* for *Melbourne*, with a general Cargo, and arrived in *Melbourne* on the 4th of June, 1869. The Ship

(1) 4 Rob. 245.

(2) The appeal came before the Judicial Committee in pursuance of the *Admiralty Court Act* (*Ireland*), 1867 (30 & 31 Vict. c. 114), which, by sect. 90, abolishes appeals from the Court of Admiralty to the High Court of Delegates in *Ireland*; and by sect. 91 gives a right of appeal to the Court of appeal in Chancery in *Ireland*, and thence to Her Majesty in Council; or, in the first instance, direct to Her Majesty in Council. Sect. 105 enacts, that the provisions in the several Acts in force relating to the appellate jurisdiction of Her Majesty's Privy Council in *England*, are to extend and apply to appeals under that Act.

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was under charter to proceed from *Melbourne* to *Callao*, and there to load a cargo of Guano for the *United Kingdom*; but the charter-party was conditional on her arriving at *Callao* before the 30th of September, 1869.

The Ship before she sailed from *London* had been mortgaged by her Owners, the Appellant and Captain *Barrett*, to *Gumm*; and as further security for the advances which *Gumm* had made, the Owners, by a Letter, assigned to *Gumm* the freight and earnings of the Ship, appointed him their Attorney to receive the freight and insurance moneys, and constituted him Ship's husband and sole Agent for the Ship at home and abroad.

The Ship was consigned by *Gumm* to Messrs. *Dickson & Williams*, of *Melbourne*, as Ship Agents or Brokers at that port, and this arrangement was confirmed by the Appellant.

After a long voyage, in which the Vessel encountered very heavy weather, she arrived in *Melbourne* in June, 1869, leaking badly; and it was considered necessary that she should go into dock and be put on a patent slip, to ascertain where she was leaking and for repairs. The Captain did not know, and could not have ascertained, what repairs would be required until she had been put on the slip; but he believed that they would not be of an extensive character, and that the freight in his hands, which amounted to over £2,000, would be more than sufficient to pay for all necessary disbursements.

The Ship was unable to get on the slip until some days after the 16th of July, which was the English mail day; it was then found that she required extensive repairs, and to be caulked, metalled, and refastened. The repairs were done under the supervision of the Surveyors of the Chamber of Commerce, and the Vessel left the slip about the 12th of August.

By the next mail, on the 13th of August, the Captain wrote to the Appellant, and also to *Gumm*, informing them of the nature of the repairs which had been found to be necessary, and of the probable cost, being about £3,000, and stating to the Appellant that he did not know how the money which would be necessary to pay for the repairs and other disbursements of the Vessel was to be raised. No reply to these Letters could have been received for upwards of four months.

The exact cost of the repairs was not known until the 24th of August, when the Shipwrights' Bill was sent in. The amount of the repairs alone was £3,007. 13*s.* 1*d.*, and there were other disbursements necessary before the Vessel could be sent to Sea. At that time a reply to a communication from *Melbourne* to *Eugland* could not have been received much before December, even if such communication and such reply had been forwarded between *Point de Galle* and *England* by Telegram. There was no telegraphic communication between *Australia* and *Point de Galle*, and the mail between those places ran once a month only.

The Captain then applied to the Ship Agents, Messrs. *Dickson & Williams*, to advance the amount required, over and above the freight he had in hand. That Firm refused at first, but upon the Shipwright threatening to arrest the Ship and sell her, they agreed to advance the money upon a Bottomry Bond of the Ship and freight.

Gumm had transacted business with Messrs. *Dickson & Williams* for many years, and it appeared that in order to serve him Mr. *Dickson* suggested to the Captain (after it had been agreed that a Bottomry Bond should be given) that he would take the Captain's draft on *Gumm* for the amount of the Bond without premium, charging simply the usual commission, and that if the draft was duly honoured instructions should be given that the Bond should not be enforced. To this the Captain agreed, and upon those terms a Bottomry Bond was executed on the 7th of September, 1870, for the sum of £3,265. The Bond was on the Ship and freight, to be earned on her intended voyage from *Melbourne* to *Callao*, and from thence to any other port or ports; and it was stipulated that the Bond was to be absolute seven days after her arrival at *Callao*.

Before the Vessel sailed the Ship's accounts were made out, and the Captain drew a Bill, at ten days' sight, on *Gumm*, in favour of Messrs. *Dickson & Williams*, for the amount due to them, viz. £3,586. 10*s.* 1*d.* Afterwards the Captain drew another Bill for £19. 7*s.* 5*d.*, the amount of some small accounts which he required to pay. These Bills were negotiated by *Dickson & Williams* with the Bank of *New South Wales* in *Melbourne*, and the Bond was assigned to the Bank as security.

It was arranged between Messrs. *Dickson & Williams* and the Bank, with the knowledge and consent of the Captain, that the

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Bond should be sent to Messrs. *Gibbs*, the Agents of Messrs. *Dickson & Williams* at *Callao*, with instructions to take the directions of the *Bank of New South Wales* in *London* (by whom the Bills would be presented) as to enforcing the Bond. The *Staffordshire* was expected to arrive at *Callao* before the Bills reached *London*, and it was, therefore, necessary that directions should be sent out to *Callao* by the first mail after the presentation of the Bills in *London*, in order that Messrs. *Gibbs* might know whether or not they were to arrest the Vessel under the Bond. These arrangements were communicated by Letter from *Dickson & Williams* to *Gumm*.

The Ship sailed from *Melbourne* to *Callao* on the 11th of September, 1869. Mr. *Dickson* left *Melbourne* on the next day, and arrived in *London* on the 30th of October, 1869.

The drafts reached the Respondents' Bank in *London* on the 1st of November, 1869, and were presented at *Gumm's* office for acceptance on the same day, but they were returned to the Manager of the Respondents' Bank, with the message that they could not be accepted, as *Gumm* was dead. The death of *Gumm* had taken place on the preceding 12th of October, and as his Executors had refused to act no probate of his Will or Letters of Administration of his estate had been granted.

On the same day Mr. *Currie*, the Secretary of the Respondents' Bank, called at *Gumm's* office and saw a Mr. *Ford*, who had for many years acted as Manager of *Gumm's* business, and was then acting for the Gentlemen whom *Gumm* had named as his Executors. *Ford* then refused to accept the Bills.

The Bills were again presented through a Notary on the same day, and were returned marked "No advice," and were then formally protested.

The next mail to *Callao* was on the 6th of November, and by it the *Bank of New South Wales* advised Messrs. *Gibbs* of the dishonour of the Bills and instructed them to enforce the Bottomry Bond.

The mail to *Melbourne* went on the 5th of November, and by it the protest of the Bills was sent out, and notice was given to the Bank at *Melbourne* that the Bills had been dishonoured.

The *Staffordshire* arrived at *Callao* and loaded under her original charterparty, and she secured a freight above the then current rate; she sailed from *Callao* on the 25th of January, 1870, before

the Messrs. *Gibbs* were able to enforce the Bond, and arrived at *Queenstown*, in *Ireland*, where she was arrested by the Bondholders on the 13th of July, 1870.

On the 28th of April, 1871, the suit came on for hearing in the Court below, and the Judge (Mr. Justice *Townsend*), in an elaborate judgment, pronounced for the validity of the Bottomry Bond, referring it to the Registrar to take an account, and ascertain the sum due on account of the Bond.

The present appeal from this decree was brought direct (1) to Her Majesty in Council.

Sir *George Honyman*, Q.C., and Mr. *A. Cohen*, for the Appellant:—

Contended, that no attempt was made to procure the money, which was absolutely necessary to enable the Ship to leave *Melbourne*, on the credit of *Gumm*, or the Appellant; that no communication was made to *Gumm* or the Appellant, leading to the inference that it would be necessary to hypothecate, and no opportunity had been given to either of them of supplying Messrs. *Dickson & Williams* with the requisite credit or funds, as they would have done; that the fact that no advertisements for tenders were published at *Melbourne*, applied with especial force to the position of the Appellant, on the ground, that Messrs. *Dickson & Williams* were Ship Agents for the Ship, and aware of the mercantile position of *Gumm* as Mortgagee; that Messrs. *Dickson & Williams*, as Agents for the Ship, ought to have been cognisant of the amount which was being expended on the repairs of the Vessel; and that the terms of the the Bond, the items for which the same was given, and the maritime premium thereby made payable, were such as to make the Bond, under the circumstances, void against Messrs. *Dickson & Williams*, as Agents for the Ship, and against the Respondents, who had no better title. They contended, further, that the Bottomry Bond was void by reason of Messrs. *Dickson & Williams* having taken the Bills drawn by Captain *Barrett* on *Gumm*, or had become void or incapable of being put into suit by reason of Messrs. *Dickson & Williams* having negotiated the Bills, and that the agreement and condition upon which the Bond was given had been violated by Messrs. *Dickson & Williams* and the Respondents. That the Bills

(1) See Foot-note, *ante*, p. 195.

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were never duly presented nor dishonoured; referring to *Van Wart* v. *Woolley* (1); *The Hero* (2); *Byles* on Bills, pp. 183, 203; *Chitty* on Bills, p. 246 [10th Ed.]; *Bayley* on Bills, p. 219 [5th Ed.]; *Story* on Bills of Exchange, § 372; and submitted, that before the maturity of the Bills the amount of the Bills was offered to the Respondents, who refused to accept the same, except on the fulfilment of conditions which they had no right to impose; that the Respondents, who had no better title than Messrs. *Dickson & Williams*, acted unjustly and inequitably in giving directions that the Bond should be enforced, and by refusing to revoke those directions when the amount of the Bills was offered to them; and, lastly, they insisted, that the Bond could not attach on the freight which was subsequently earned after the Bond became absolute. They cited the following authorities:—*Parsons* on Shipping, B. I., ch. 6, s. 8, and the authorities there referred to; *The Karnak* (3); *The Panama* (4); *The Prince of Saxe-Cobourg* (5).

Mr. *Butt*, Q.C., and Mr. *J. C. Mathew*, for the Respondents:—

Insisted, that the judgment of the Court of Admiralty of *Ireland* was right, as the Bottomry Bond was shewn to have been the primary, and not a collateral, security; that the arrangement as to the Bills formed no part of the contract upon which the money was agreed to be advanced, and could not control the Bond; and that even if it were the duty of the holders of the Bills to have the Bills duly presented before the Bond could be enforced, that condition had been complied with. That the Bottomry Bond was a valid Bond, as it was not reasonably practical for the Captain to have communicated with the Appellant; and that the judgment of the High Court of Admiralty of *Ireland* was fully supported by the evidence. They referred to and relied on the following cases: *The Ariadne* (6); *Stainbank* v. *Fenning* (7); *Stainbank* v. *Shepard* (8); *The Lord Cochrane* (9); *The Tartar* (10); *The Huntcliff* (11); *The Jacob* (12); *Parsons* on Shipping, B. I., p. 163.

(1) 3 B. & C. 439.
(2) 2 Dod. 144.
(3) Law Rep. 2 P. C. 505.
(4) Law Rep. 3 P. C. 199.
(5) 3 Moore's P. C. Cases, 1.
(6) 1 W. Rob. 411.
(7) 11 C. B. 51.
(8) 13 C. B. 418–441.
(9) 2 W. Rob. 335.
(10) 1 Hagg. Ad. Rep. 1.
(11) 2 Hagg. Ad. Rep. 281.
(12) 4 Rob. 245.

Their Lordships' judgment was pronounced by

THE LORD JUSTICE MELLISH :—

This is an appeal from a decree of the Court of Admiralty in *Ireland*, in favour of a Bottomry Bond. There is a very elaborate judgment of the learned Judge of the Court below, and their Lordships do not think it necessary to go minutely into the facts of the case, as far as regards those parts of the case in which they thoroughly agree with that learned Judge.

The general facts were, that the *Staffordshire*, which was the Ship bound by the Bottomry Bond, had been previously mortgaged to *Gumm*, and the freight to be earned on the voyage to *Melbourne* and round from *Melbourne* to *Callao* and back, taking a cargo of Guano from the *Chinchas* to *England*, had also been pledged by a Letter from the Owners to *Gumm*, and *Gumm* was to have the appointment of the different persons to whom the Ship was to be consigned, the Ship Agents, so that he might have a control over the freight. He consigned the Ship to Messrs. *Dickson & Williams* of *Melbourne*. The part-owner, *Smith*, the Appellant (*Barrett*, the Captain, being also a part Owner), wrote confirming that appointment, but as there was a considerable sum, more than £2,000, to be received at *Melbourne* for the freight on the outward voyage, it was evidently anticipated at first by all parties that that sum would be sufficient to pay the disbursements in *Melbourne*. The Ship having encountered bad weather, on its arrival at *Melbourne* wanted some repairs, and the repairs were commenced; but in the Letters which were first written it appeared clearly to have been anticipated that the freight would have been sufficient for the payment of the cost of the repairs. The repairs, therefore, proceeded, and in August the parties were informed that a considerably larger sum was being expended than was anticipated, namely, £2,000. Even at the time when they wrote by the mail in August they do not appear to have made up their minds that any Bottomry Bond was necessary; but when the repairs of the Ship were finished at the beginning of September, and they found that they amounted to upwards of £3,000, then the Ship Agents said that they could not pay that large sum, which the persons who had repaired the Ship were entitled to receive, and in respect of which they threatened

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to put the Ship into the Court of Admiralty; unless they got a security on bottomry, and on that this Bottomry Bond was given.

The first question to be considered is, whether the Bottomry Bond was generally good with reference to the rules which are well established in the Courts respecting Bottomry Bonds. First it was said, that it was not sufficiently proved that it was given for necessaries; that a large sum appeared to have been expended in repairing the Ship. It was also said that the Ship had been entirely rebuilt, and that there could only be expended on Bottomry a sufficient sum for the repairs that were necessary for the particular voyage. When it is considered that the voyage was to go to *Callao*, and then to the *Chincha Islands*, and take a Cargo of Guano for *England*, which is notoriously one of the heaviest Cargoes that can be obtained and carried by a Ship, it is very difficult to suppose that more repairs could have been effected than what would be necessary for the purpose of such a voyage.

But however that might be, it is clear that a very large portion, if not the whole of the sum advanced must have been for necessary repairs. The question of amount is to be referred to the Registrar, and, therefore, it is clear the Bond cannot be held bad, because it was not taken for necessary expenses.

It is next said, that there was not sufficient evidence that the money could not have been borrowed on the personal credit either of *Gumm*, or the in part Shipowner *Smith*, and that there was not sufficient evidence that the Master attempted to borrow money on their personal credit. The answer to that appears to be, that there was no power in anybody to pledge the personal credit of *Gumm*. He was not the Owner, only the Mortgagee of the Ship. He had, no doubt, put the Ship into the hands of *Dickson & Williams*, the Ship Agents, but it appears very doubtful, whether his credit could have been pledged even to them, and certainly there is no evidence that he gave *Dickson & Williams* any authority to borrow money on his credit from anybody else. Therefore, it is wholly immaterial that *Gumm* was a person in good credit, because money could not be borrowed on his credit.

As respects the Appellant, *Smith*, the Shipowner, there is not the slightest reason to suppose that he was a person in any credit at *Melbourne*, and it really appears to their Lordships it would

have been perfectly idle to advertise for anybody to lend money on his personal credit, because it was plain that nobody would lend money on such credit.

It was next said, that the Master ought to have communicated to *Gumm* and *Smith* in *England*, before he borrowed the money on Bottomry. The answer to that appears to be, that there was really no opportunity of doing it. They did not know certainly before the mail went out in August that it would be necessary to borrow money on bottomry, and it appears very doubtful whether they really knew it then, and whether they fairly knew it before September. But even if it be assumed that they knew it in August, there was no direct communication by telegraph. The message would have had to be sent to *Point de Galle* by Steamer, and by telegraph from *Point de Galle* to *England*. Sending in that doubtful way, first writing a Letter to the parties to frame the telegram at *Point de Galle*, and then to send it by telegraph, it would have been very difficult to give any thorough account of the state of things; and even if it could be done, it would have taken certainly more than two, and probably full three months before the answer could have been got back.

Under these circumstances it appears to their Lordships, that it was not necessary, it would have been, in fact, very unadvisable, to have kept the Ship at *Melbourne* all that time, more particularly as the Captain himself was a part Owner, and, therefore, quite as able to judge as *Smith* was, what was desirable to be done; and more particularly also it is to be taken into account that, after all, the parties were not pledged to the Bottomry Bond because a Bill was drawn on *Gumm*, and, which is very material in another part of the case, it was agreed at the time when the Bottomry Bond was given, that if that Bill was accepted and paid when it became due, then the Bottomry Bond was not to be enforced.

But then it was urged very strongly by Mr. *Cohen* that the Law looks with great suspicion upon a Bottomry Bond given in favour of the Ship Agents, and that on that account, even although this might have been good if it had been given to some other person, it was not good considering it was given to the Ship Agents; and some passages were cited from Lord *Stowell's* judgment in the case of *The Hero* (1), in which he says with respect to an Agent, "Cases

(1) 2 Dod. 144.

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may possibly arise in which an Agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his Employers beyond certain reasonable limits, he may then surely be at liberty to hold hard, and to say, 'I give up the character of Agent,' and, as any other Merchant might, to lend his money upon Bond to secure its payment, with maritime interest. If in such a case he gives fair notice that he will not make any further advances as Agent, and affords the Master an opportunity of trying to get money elsewhere, and the Master is unable to do so, but is obliged to come back to him for a supply, then, he is fairly at liberty, like any other Merchant, to advance the money on a security that is more satisfactory to himself."

It appears to their Lordships, that practically the Ship Agents in this case did really act and do everything that they were required to do as laid down by Lord *Stowell*, because they did give fair notice to the Master that they would not make any further advance. They told the Master, "This Bill is so very large that we shall not be able ourselves to advance the money to pay it;" and they did give the Master the opportunity of borrowing money elsewhere, which does not appear to mean, as was argued, to borrow money upon Bottomry elsewhere, but to borrow money elsewhere on the personal credit of the Owners.

It is perfectly plain that the Master could not borrow money on the personal credit of the Owners. Then he comes back to the Ship Agents. The reason why the Law looks with suspicion on money advanced by the Agent is, that the Agent to some extent, at any rate in most cases, agrees that he will make some advances on the personal credit of the Shipowner. The Shipowner in ordinary cases has put the Ship into his hands and he is dealing with him; but in the present case it would be very difficult to say, that the Agents, Messrs. *Dickson & Williams*, at *Melbourne*, agreed to advance one farthing on the credit of *Smith*, the Shipowner, the Ship really being put into their hands by *Gumm*, the Mortgagee. They would have been quite willing apparently to advance money on the credit of the Mortgagee, *Gumm*, but then it was doubtful, whether *Gumm's* credit was really pledged. As to *Smith*, they looked upon him as a person of no

credit, and never intended or held out the least in the world that they would advance money to him.

It appears to their Lordships that, under these circumstances, it was a perfectly fair transaction for them to say to the Master "You must give us a Bottomry Bond; but you shall draw a Bill on *Gumm*, who is a person in good credit, and who has put the Ship into our hands, and who may be desirous to prevent the Bottomry premium being incurred, and so his security on the Ship being lessened; he may prefer to pay these expenses rather than to have his security lessened by the Bottomry Bond being enforced against the Ship. Still draw a Bill on him, and if he pays that Bill well and good; then there will be no Bottomry."

It appears to their Lordships that, under the circumstances, that was a perfectly fair mode of dealing on the part of the Ship Agents, and that it would be wrong to hold that the Bottomry Bond was bad on the ground that it was given to the Mortgagees' Agents.

Neither does it appear that there was the least reason to suppose that anybody else would have advanced money on Bottomry on the same conditions. Other parties very likely might have been found to advance money on Bottomry for the voyage. They would have expected to have obtained their Bottomry premium, at all events if the Ship arrived, and it is not likely that anybody else would have been content to draw a Bill on *Gumm* and take the chance of that being paid, and say, if that is paid, then the Bottomry Bond is not to be enforced.

Therefore, on this part of the case, their Lordships agree with the judgment of the learned Judge in the Court below, that the Bottomry Bond is perfectly valid.

The next, and a very important part of the case is this:—It is said that the Bill of Exchange was never properly presented, and never properly dishonoured, and that the Court of Admiralty in *Ireland*, as a Court of Equity, ought to have prevented the Bond being enforced, and ought to have decreed that all that the parties were entitled to was to have the Bill of Exchange paid.

The circumstances on that part of the case were these:—The Bill on *Gumm* was drawn at ten days' sight, and there appears to have been a reason why it was drawn on a few days' sight, and why it was important that it should be accepted immediately,

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namely, that it was known that the voyage to *Callao* would probably not last very much longer than the time it would take for the Bill to arrive in *England*, and that if the Ship was to be seized and the Bottomry Bond was to be enforced at *Callao*, there would be very little time left after the Bill arrived, before it would be necessary to send out orders from *England* to seize the Ship at *Callao*.

The Bill arrived in *England* on the 1st of November, and, unfortunately, *Gumm* had died some weeks before, which has caused the whole difficulty in this part of the case. The Bill had been sold to a Bank in *Melbourne*, and the Bottomry Bond had been also deposited with the Bank as a security for the payment of the Bill, and the Bill with the Bond had been sent over to the Bank's Agents in *London*. The Bill was sent to *Gumm's* office to be presented in the ordinary way, *Currie*, the Manager of the Bank, not being aware that *Gumm* was dead. When the person sent comes there, he finds *Ford*, who had been the Manager of the business during *Gumm's* lifetime. *Gumm* had been for some time apparently confined to his bed, and *Ford* had had the entire management of his business, and *Ford* is found there. The evidence of the different Witnesses do not very accurately agree as to what took place. At any rate, *Ford* would not accept the Bill, but he was the person who first gave information that *Gumm* was dead, and that he had left Executors. The holder of the Bill came a second time, and a third time, and *Currie* went himself, and then notice was given that one of the Executors was abroad. He does not appear to have been told who the other Executor was, neither did *Currie* inquire. The Bill certainly was not accepted, and *Ford* says that he had no authority to accept, and he says he did not lead them to believe that he dishonoured the Bill on the part of the Executors. Their Lordships cannot help thinking that there must have been an impression given to *Currie* that *Ford* did profess to act for the Executors, and did tell him that the Bill would not be accepted. He told them on one of the occasions that he repudiated the transaction altogether, and thought the Bottomry Bond was altogether invalid.

This having taken place, a Notary is sent. The Notary appears not to have been told that *Gumm* was dead, and, therefore, he

merely presented the Bill and caused it to be protested in the ordinary way. *Hallett*, one of the persons who had been named in the Will of *Gumm* as Executor, was living in *London*, and *Ford* communicated with him; therefore, *Hallett* certainly had information that this Bill had been presented. He referred them to the Solicitors who had acted for *Gumm*, and were apparently acting for the Executors. What precisely passed with the Solicitors does not appear, but communications were had by *Ford* with *Smith*, or persons acting for *Smith*, for the purpose of endeavouring to raise money for paying the Bill, and *Ford* called on *Currie* on the 5th of November, 1869, and left a Letter which, whether he had authority from the Executors or not, professed to be written by the authority of the Executors, and asked that the Bill should be presented again when it became due. But they did not hold out or make any promise that it would be paid. Then *Currie* told them that the Bill would be sent out on the 6th, which was the day when the mail left, which would take the orders to *Callao;* and he told them that, unless the Bill was paid that night, unless they produced the cash, he should send out the Bond to *Callao* for the purpose of being enforced; and it appears to their Lordships that there was no distinct promise that the money should be paid prior to the time when the Bond was sent out.

The main question to be decided really is, whether the Bond was sent out too soon. After the Bond had been sent out there were a variety of negotiations, and before the time when the ten days and the days of grace would have elapsed; assuming the presentment to have been good, there was a promise that if the Bond and the Bill were given up the amount of the Bill would be paid; but then, the Bond having gone out that could not be done, and a claim was made for an indemnity that was refused; and further negotiations went on, and the result was that the parties never agreed.

The question, then, is, was the Bill presented? Their Lordships think that it is hardly necessary in deciding this case to say, whether the Bill was presented, or that it would have been a good presentment of the Bill for the purpose of giving notice of dishonour to prior parties to the Bill. There appears to be very little authority indeed as to what is to be done to present a Bill under

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these circumstances. It is laid down in Mr. Justice *Byles'* Book on Bills that if the Drawee of a Bill is dead the party ought to inquire for his personal representative. But in the present case no administration had been taken out, and no Will had been proved. Then if a party who presents a Bill is informed that there has been a Will, and persons named in the Will as Executors, but who have not taken out Probate, who have not determined whether they will act or not, is he bound to present it to such a person who may or may not afterwards take out Probate, or may or may not afterwards turn out to be the Executor? There is very great difficulty in that. There seems great difficulty in saying that a person would be bound to take the acceptance of anybody whose authority to give that acceptance, and whose authority as Executor, had not been recognised by Probate being granted.

Their Lordships do not think it necessary to give a decisive opinion on that question, because they agree with the argument that they have heard that the real question here is, did the parties do, under all the circumstances, what was reasonable for the purpose of getting the Bill accepted and paid? Their Lordships are of opinion, that it is clear that if the Bill had been presented to *Hallett*, who was the only person named as Executor in *England*, it would have had no effect; that he would have refused to accept it, and that presentment to him would not have really made any difference in the case. Look at what the position of *Hallett* was. *Gumm* was not liable for this amount. It would have been a very serious thing indeed for any Executor to accept a Bill drawn upon his Testator for a debt for which his Testator was not actually liable. *Hallett* was informed by *Ford* of the Bill having been drawn and presented. He referred to his Attorney, who afterwards appeared in some of the negotiations, and was present at them. If *Hallett* had really intended to accept it there was ample opportunity for them to have seen and informed *Currie* that the Bill would have been accepted; but before the Bond was sent out the Executors never offered to accept, neither did anybody offer to accept, nor did anybody offer to promise to pay; but all that was said was, "We desire that you should keep this Bill for some more days, until in the ordinary course it becomes due, and then present it again." Was *Currie* bound to wait under

these circumstances? Their Lordships think he was not, and for this reason; time was very material. It was known that even if they sent out by that mail it was very doubtful whether the Bond would arrive out in time at *Callao* in order to stop the Ship. If the Ship left *Callao* the consequence would be that it would go to the *Chinchas*, take in a cargo of Guano, and there would be all the risk of the voyage from the *Chinchas* to *England;* and moreover, though possibly the parties did not know that such was the law, the Bond having become due, and being forfeited seven days after the arrival of the Ship at *Callao*, the Bottomry holders would have had no insurable interest on the subsequent voyage.

Under these circumstances it was very material that they should send out the Bond by the first mail, and the other parties must have been, or at any rate ought to have been, aware of that.

Therefore, on the whole it appears to their Lordships, that the Bond was not sent out too early, that there was no violation of the agreement which Messrs. *Dickson & Williams* had made at the time the Bond and the Bill of exchange was taken, that they would give the opportunity to *Gumm* of accepting and paying the Bill before they would enforce the Bond. No doubt it was a misfortune for which nobody was answerable, that *Gumm* happened to be dead. But still their Lordships think, that the Bill having arrived, and there being several days during which the Bank could get neither acceptance nor payment before the next mail went out, they were justified in sending out orders by that mail with the Bond, to have the Bond enforced.

The next question to be decided is this: was the Bond so drawn as to hypothecate any freight which might be earned between *Callao* and *England;* the Bond was made payable at *Callao*, and it is objected that though the Bond may be generally good, yet it is bad as respects subsequent freight. And their Lordships are of opinion, that the Bond does not validly hypothecate such freight, although it was admitted that the Bond being bad in that respect does not make it entirely bad, but that it is still good as respects the Ship. An ordinary Bottomry Bond beyond all question only pledges the Ship, and sometimes the Cargo and the freight to be earned on the voyage which is to be accomplished before the

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Bottomry Bond becomes payable; and their Lordships have not been referred to any case in which freight to be earned on a subsequent voyage has been included in a Bottomry Bond. It was held in *The Jacob* (1) that the subsequent freight under very peculiar circumstances might be liable, but there is no form of a Bottomry Bond produced which on the face of it professes to charge and hypothecate the subsequent freight; and their Lordships are of opinion, that subsequent freight cannot be hypothecated, for this reason: That by the very nature of a Bottomry Bond the person who takes it is to become liable for the Maritime risk, and, therefore, nothing can be hypothecated, except something which is in danger of perishing by Maritime risk during the time that the Bond is running. But here that freight was not begun to be earned, the Cargo was not loaded on board until after the Bond was forfeited, and when no Maritime risk was being run by the person who had advanced his money on bottomry, because the Bond being forfeited he already had got the personal security of the Master. And, moreover, if there can be a valid pledge of the subsequent freight it does not appear why there should not be a valid pledge of the freight until the Bottomry Bond holder chooses to seize the Ship. It is difficult to see where the end of it would be.

The only case which has been cited was the case of *The Jacob* (1); it is unnecessary to say, whether that was rightly decided, but it hardly appears to be an authority on the question, for there the subsequent freight had not been hypothecated; but Lord *Stowell* came to the conclusion that by deviating from the proper voyage, and from going away too early, the Shipowner had wrongfully deprived the Bottomry Bond holder of the freight which really was pledged, namely, the freight to be earned in the current voyage, and that, therefore, it was right, the Ship having got away before it could be seized, to hold that the subsequent freight could be seized. Their Lordships give no opinion, whether that was right or wrong, but that case does not appear to be an authority for giving a pledge of the subsequent freight. Their Lordships have come to the conclusion that there was no valid pledge of the subsequent freight.

The question then arises, what ought to be done? Both Ship and

(1) 4 Rob. 245.

freight were seized when the Ship arrived at *Cork*. Bail was given generally, and the Ship was released, and earned freight subsequently. Then it was said, that because the bail had been given generally, and Ship and freight had been released, there could be no subsequent inquiry into the value of the Ship and freight; but practically the parties by giving bail must be considered to have agreed that if the Bond was held to be valid in any part then the bail would pay the amount of the Bottomry Bond, which was the amount for which they had given bail. Their Lordships find that that is not the rule in the Admiralty Courts, but that after bail has been given, on a proper case being made out, the Court of Admiralty will go into the question, whether the *res* which was seized—the whole of the property which was attached—was of more or less value than the amount for which bail was given, and if it is found that it is of less value, then the parties will only be obliged to pay the amount of that. That appears to have been decided by Dr. *Lushington* in the case of *The Duchesse de Brabant* (1); but that was a case of collision. The marginal note is, "The bail is only liable to the extent of the value of the Ship and freight, and not for the full amount of the damage done, even although, as in the present case, bail may have been given for a sum beyond the value of the Ship and freight;" and there it was decided, that on a proper case being made out, a subsequent inquiry may be made into the value of the Ship and freight, notwithstanding bail has been given for a larger sum. If that may be so when both Ship and freight are held to be liable, *à fortiori*, their Lordships are of opinion, that it would be the case if the Court comes to the decision that though the Ship is liable the freight is not; and, therefore, they are of opinion, that the decree of the Court below ought to be varied by declaring that the Bottomry Bond was not a valid hypothecation of the freight earned by the Vessel on the voyage from *Callao* to *England*, and operated only as a hypothecation of the Ship, and by referring it to the Registrar to ascertain what was the value of the Ship when released. Subject to that variation, the decree of the Court below will be affirmed, but the decree having been varied in a substantial part of the case, their Lordships will humbly report to Her

(1) Swa. 264.

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Majesty that it should be affirmed with that variation, but without costs to either side.

Their Lordships understand that it will be for the convenience of both parties that the cause should be retained in this Court, and that the questions remaining to be determined should come before Her Majesty's Registrar in Maritime causes. This course may, therefore, be pursued.

Solicitors for the Appellant: *Westall & Roberts.*
Solicitors for the Respondents: *Waltons, Bubb, & Walton.*

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THE OWNERS OF THE SHIP "MARPESIA" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE BARQUE OR VESSEL "AMERICA" AND HER CARGO } RESPONDENTS.

THE "MARPESIA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision—Inevitable accident, definition of—Onus of proof—Pleadings—Costs.

4 Asp. 134
205
2 PD 37 8
4 PD. 120

Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill: *The Virgil* (1) followed and approved.

Held, affirming the principles laid down in *The Bolina* (2), that where in a cause of collision the defence of inevitable accident is raised, the *onus* of proof lies, in the first instance, on those who bring the suit against the Vessel and seek to be indemnified for damage sustained; and does not attach to the Vessel proceeded against until a *primâ facie* case of negligence and want of due seamanship is shewn.

If a Plaintiff in a collision suit intends to rely upon a particular act of negligence by the Defendant, he is bound specifically to allege that act in his pleadings, and it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not clearly state such particular

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* *Present:*—SIR JAMES WILLIAM COLVILE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

(1) 2 W. Rob. 205. (2) 3 Notes of Cases, 210.

act; as it is likely to mislead the Defendant, and prevent his being prepared to meet that particular case.

Two sailing Vessels approaching stem on in such a manner as that, under the Sailing Rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about two hundred yards. The Defendants' Vessel, having been close hauled on the port tack, was then preparing to go about, and had eased off her head sheets. Both Vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The Plaintiffs' petition alleged, that the Defendants' Vessel neglected to port, and it was stated, in answer to a question by the Judge of the Admiralty Court, that the head sheets of the Defendants' Vessel were not again hauled aft. On this evidence that Vessel was held to blame by the Admiralty Court, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other Vessel:—

Held (reversing the decision of the Admiralty Court), that the collision was the result of an inevitable accident, the Defendants' Vessel having done all that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; and that the Plaintiffs, if they meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in their petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission.

It is a rule in the Admiralty Court, in cases where a collision is found to be the result of inevitable accident, to make no order as to costs, unless it can be shewn that the suit was brought unreasonably and without sufficient *primâ facie* grounds. This rule followed by the appellate Court: *The London* (1) approved.

THIS was an appeal from a decree of the Court of Admiralty, in a cause of damage civil and maritime, brought by the Respondents the Owners of the Barque *America,* and the Owners of her Cargo, against the Ship *Marpesia*, belonging to the Appellants, for the recovery of damages in respect of a collision which happened between the two Vessels.

The collision took place at about 10 a.m. on the 21st of May, 1870, in the *St. George's Channel*, near the *Saltees* Light Ship.

The *Marpesia* was prosecuting a voyage from *Liverpool* to *Melbourne, South Australia,* laden with a general Cargo. She was a Ship of 1,443 tons register, and was 237 feet in length. The wind was about S.W., and until just before the collision the *Marpesia* was sailing by the wind on the port tack, heading about from W. by N., to W.N.W., her speed being about five knots. The *America* was bound from *Queenstown* to *Glasgow* with a cargo of Sugar, and was proceeding under all square sail, with a free wind heading about E. by S.

(1) Br. & L. 82.

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From the evidence, it appeared that a dense fog prevailed at the time of the collision, the utmost distance at which it was possible to see a Ship being, according to the evidence of the Master of the *America*, about from one hundred to one hundred and fifty yards, and in his deposition before the Receiver of Wrecks he admitted, that there was no time to alter sail on either Vessel. It was proved on the part of the *Marpesia*, that her helm had been put to starboard for the purpose of putting her from the port on to the starboard tack, and that she was under the influence of her starboard helm, and that her head sheets had been eased off when the head sails of the *America* were seen ahead emerging through the fog, and that the helm of the *Marpesia* was immediately put hard aport, but that the collision nevertheless occurred, the jibboom of the *Marpesia* passing over the *America*, and the stem of the *Marpesia* taking the port side of the *America*.

The defence relied on by the Appellants was that the collision was the result of inevitable accident.

The Judge of the Court below (The Right Hon. Sir *Robert Phillimore*) held that the *Marpesia* was solely to blame, as she ought to have hauled aft her head sheets and let go all the lee braces, and pronounced the *Marpesia* to blame for the collision.

The appeal was from this decree.

Mr *Butt*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants:—

Our contention is, that the evidence established the fact that the collision was the result of inevitable accident, and could not have been avoided by the exercise of ordinary care, caution, or maritime skill by either Vessel: *The Virgil* (1). There was no negligence on the part of the *Marpesia*. It was proved that, in the state of weather, the *America* was seen by us as soon as it was possible for those on board the *Marpesia* to discern her, and that immediately proper measures were taken to avoid a collision, though the time proved insufficient to prevent it: *The Lochlibo* (2). Owing to the short distance at which the *America* was sighted, it was impossible for the head-sheets of the *Marpesia* to have been hauled in time, or to haul her aft head-sheets, as this was a part of the manœuvre of porting her helm, and would have assisted the Ship in more

(1) 2 W. Rob. 201–205. (2) 3 W. Rob. 310–318.

effectually answering her helm; and the ground on which the judgment of the Judge of the Admiralty proceeds is, that we did not do that, which was not in our power to have done, to make our Vessel answer her helm after porting, and so avoid the collision. Therefore, he erroneously concluded that we did not obey the Steering and Sailing Rules, Art. 11, by porting helm in time, for which negligence he held the Defendants liable. This point, however, was not raised by the pleadings or insisted on in the argument, but alone was suggested by the Court. If the Plaintiffs intended to raise such a point, or to rely on it, they were bound to have stated it in their pleadings, so as to give the Defendants an opportunity of meeting such an allegation by evidence. The Court below was not entitled to give judgment on an issue not raised by the pleadings: *The Ebenezer* (1); *The Speed* (2). The Plaintiffs were bound to prove their case *secundum allegata et probata*: *The North American* (3); *The Ann* (4).

Mr. *Milward*, Q.C., and Mr. *A. Cohen*, for the Respondents:—

First, it was proved by the evidence, that the *America* was not in any way to blame for the collision, and that the collision was not, as alleged, an inevitable accident by reason of the *Marpesia* being in stays, or otherwise. She was bound to have assisted her helm by hauling in her head-sheets and letting her lee braces go. It is alleged in the pleadings, that the *Marpesia* neglected to port her helm. That allegation refers not merely to the act of putting her helm to port, but includes all other measures which a Seaman would, in the exercise of nautical skill, adopt for the purpose of throwing his Ship's head to starboard, and so assisting his port helm. It was not necessary to allege in the pleadings in specific terms that the *Marpesia* neglected to do this, or to let her lee braces go. Secondly, with respect to the doctrine of inevitable accident: the rule at Common Law is, that a Plaintiff is bound to give *primâ facie* proof that the Defendant is guilty of negligence, even where the defence of inevitable accident is set up, and not until that fact is established is the *onus* of proof shifted to the Defendant; but a different rule prevails in the Admiralty Court—when inevitable accident

(1) 2 W. Rob. 206–209.
(2) Ibid. 225–227.
(3) 12 Moore's P. C. Cases, 331.
(4) 13 Moore's P. C. Cases, 198.

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is pleaded, it is the practice for the Defendant to begin, and the *onus* is, therefore, thrown upon them. The Appellants are bound, therefore, to satisfy the Court that they did all they could to avoid the accident, and we contend that they have failed to do so. Thirdly, with respect to the default of the Appellants, we contend that the evidence shews that there was a want of ordinary care and nautical skill on the part of the *Marpesia*, in not taking the proper steps, as pointed out in the judgment of the Court below, to avoid the collision. Even if the decree of the Court below should be reversed, the Respondents ought not to be condemned in costs, as they had good grounds for instituting the suit: *The London* (1); *The Itinerant* (2).

Judgment was pronounced by

SIR JAMES COLVILE:—

This is a case of collision brought by the Owners of the Barque *America* against the Owners of the Ship *Marpesia*, the *America* having been run down by the *Marpesia* in *St. George's Channel*, on the 21st of May, 1870. The points raised by the appeal lie in an extremely narrow compass. It is admitted, on all hands, that the collision took place in daylight, about ten o'clock in the morning, but in a very thick fog, in which the Vessels could only discern each other at a very short distance.

It is found by the learned Judge of the Admiralty Court, that the distance at which they could have been visible to each other, was not more than from two hundred and fifty to three hundred yards.

It is now admitted on the side of the *Marpesia*, that no blame is attributable to the *America;* and it would further appear that neither in the Court below, nor now, is it seriously contended, that the *Marpesia* was in fault in any of the particulars which are specially stated in the petition of the *America*, unless it be in one to be afterwards considered. It is no longer contended, that she was proceeding at an improper rate of speed considering the state of the weather; or that a good look-out was not kept on board that Vessel; nor is it now contended, that her helm was improperly starboarded, or that she made default in not keeping out of the way of the *America*, as she was bound to do.

(1) Br. & L. 82. (2) 2 W. Rob. 236.

The only point which is now made on behalf of the Respondents is, that it cannot be said that those on board the *Marpesia* did not make default in not porting the helm of their Vessel within the proper sense to be attached to those words.

The clear and admitted facts of the case seem to be these: the Vessels were proceeding one down the *Irish Channel* and the other up the *Irish Channel* in a thick fog. They could not have seen each other at a distance of more than three hundred yards. Their Lordships are rather disposed upon the evidence to say, that three hundred yards is an extreme limit, and that the distance within which each Vessel was visible to the other was probably nearer two hundred yards. The combined speed of the Vessels would seem from the evidence to have been about eight knots an hour, and the result of this state of things is, that not more than a minute, if so much as a minute, must have been the time which elapsed between the sighting of the two Vessels by each other and the actual collision.

It is further admitted, that the two Vessels were proceeding in such a manner as that, under the Sailing Rules, each would be bound to port its helm; that they were in fact approaching each other stem on.

It is also established by the evidence, that immediately before the *Marpesia*, which had been close hauled on the port tack, sighted the *America*, she was proceeding to tack. It may be a question how far she had gone in that manœuvre, but she had put down her helm, and had come up two or three points, and was in the act of altering her rigging in order to complete the operation of tacking. When, however, the two Vessels sighted each other, her helm was shifted, and put, as they were bound to put it, hard-a-port.

In that state of things, what is attributed to the *Marpesia* by the judgment, and substantially the only fault that has now been imputed to her at the Bar, is that she did not do something more than port her helm; that she did not take steps, which it is assumed she might have taken, in order to put the foresails into such a position that the full pressure of the wind whilst she was under the port helm would come upon them; and also to ease the pressure of the wind upon the after sails of the Vessel; the result of which operation would have been that she would have paid off

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more rapidly under the port helm than she did; and in that way, as it is contended, might have gone clear of the *America*.

The finding of the learned Judge in the Court below on this point is in these words:—"Now, she ported her helm, but I am instructed by the elder Brethren that if she had accompanied that manœuvre by hauling aft the head-sheets again, and letting go all the lee braces (and it is to be observed that all her hands were on deck at the time), in all probability she would have avoided the collision, and at all events have placed herself in a position of having done all in her power to prevent the accident. Not having done so, I must hold, that she failed to execute the proper manœuvres, which after sighting the *America* it was competent for her to have executed, and, therefore, that she is to blame for this collision."

It is to be observed that the Judge does not in terms find that the collision would have been avoided if she had done that which it is stated she omitted to do. His finding is only that, in all probability, she would have avoided the collision, and that at all events she would have been in a position in which her Owners might have said more unanswerably, that she had done all in her power to prevent the accident.

As far as their Lordships can see, the negligence thus imputed was not made a point in the suit, until the learned Judge, acting upon the advice of the elder Brethren, gave his judgment. The omission is not expressly alleged in the pleadings as a culpable omission on the part of the *Marpesia*. The Respondents' Counsel contended that it is included in the allegation that she did not port her helm, because they urge that if she had done what she omitted to do to her sails, she would have answered the port helm more efficiently. But it appears to their Lordships that, if that was the case intended to be made, the pleadings ought to have stated it, and not having done so it was likely to mislead the parties and prevent their coming to meet that case.

Nor do their Lordships find that the point was really raised by the cross-examination. There was, no doubt, a good deal of cross-examination of the Captain and one of the other Witnesses as to the discrepancies between the evidence they gave at the hearing and the statements in the log, as to what had been done with the cross-jack yards and other parts of the rigging; but it seems to their Lordships that that cross-examination was directed rather to shew

that the Ship was not, as had been stated in the log, and in the case originally put forward by the Captain, almost at rest as if she had been at anchor, and that the operation of the tacking had gone so far that she might be said to be technically "in stays," and, therefore, not under control; and, consequently, that the cross-examination was directed to shew that there was a greater speed upon her than was admitted. The only place in which their Lordships can find that the point was directly raised in the evidence, was in the examination by the Court, not of the Captain, but of the Mate, and there, no doubt, the Court asks the question, "Were the head-sheets let go?" The answer is, "Eased off." That would only go to shew what was the state of the Vessel at the time. The Court then goes on to ask, "And when were they hauled back again?" The answer is, "Never hauled back at all, not until we struck." If that omission were intended at the time to be treated as culpable negligence, one would have expected that the examination would have been continued in order to give the parties an opportunity of explaining the fact. But as far as their Lordships can see, it was mainly on these questions and answers that the elder Brethren suggested, and the learned Judge found, that there had been a culpable omission on the part of the *Marpesia*.

In consequence of one of the arguments at the Bar, it seems desirable to say something as to the burthen imposed upon a Vessel that seeks to excuse itself for a collision on the ground of inevitable accident.

The Respondents' Counsel suggested that there is some difference of practice between the Court of Admiralty and the Courts of Common Law in that matter. Their Lordships, however, cannot find that there is any such difference. They take the law as they find it laid down by Dr. *Lushington* in two cases.

In the case of *The Bolina* (1), Dr. *Lushington* says: "With regard to inevitable accident, the *onus* lies on those who bring a complaint against a Vessel, and who seek to be indemnified,—on them is the *onus* of proving that the blame does attach upon the Vessel proceeded against; the *onus* of proving inevitable accident does not necessarily attach to that Vessel; it is only necessary when you shew a *primâ facie* case of negligence and want of due seamanship."

(1) 3 Notes of Cases, 210.

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Again in the case of *The Virgil* (1), the same learned Judge gives this definition of inevitable accident: "In my apprehension, an inevitable accident in point of law is this; viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a Vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the Master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution that would have rendered the accident less probable."

Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be. Their Lordships, considering the admitted time which elapsed after the two Vessels had sighted each other to have been not more than a minute, and the state in which the *Marpesia* was, in attempting to go about, have failed to come to the conclusion that the Captain was to blame for having omitted to do that which the judgment seems to find that he might have done. It is a question entirely of navigation, and, therefore, it is one upon which they have felt at liberty to consult the Nautical Assessors who assist their Lordships; and they have been confirmed in the opinion, which they would have formed themselves from all the circumstances of the case, it being the opinion of those Gentlemen that the time was so short that the omission to do that which has been said ought to have been done with the rigging and the sails cannot be imputed as negligence, or anything approaching to negligence, in the Master of the *Marpesia*. It may be observed that this view of the case is in some measure confirmed by a statement of the Master of the *America*, who, in his examination before the Receiver of Wreck, said, "There was no time to alter sails on either Vessel, and the only precautions were confined to the helm."

Their Lordships having, for these reasons, come to the conclusion that the collision in this case was one of those unfortunate accidents in navigation which no ordinary care, caution, or mari-

(1) 2 W. Rob. 205.

time skill could have prevented, are compelled to dissent from the finding of the learned Judge of the Admiralty that the *Marpesia* was solely to blame. They will, therefore, humbly recommend Her Majesty to allow the appeal, to reverse the judgment of the Court below, and to dismiss the suit.

With regard to the question of costs, their Lordships have considered that matter. They find that in the case of *The London* (1) Dr. *Lushington* stated: "In this case the Court has found that the collision was an inevitable accident, and pronounced against the damages; and the only question now is, whether the Plaintiff ought to be condemned in costs. I quite agree with Mr. *Brett* that on principle costs ought to follow the event;" (that is also their Lordships' view); "but if there is any set rule of practice, it is necessary to abide by that. I have caused inquiry to be made, and I find that in these cases of inevitable accident the usual practice, the general rule I may call it, has been to make no order as to costs, as I had occasion to state in *The Itinerant* (2). But looking to all the cases, it is clear that the Court still holds, and will on occasion exercise, a discretionary power to condemn in costs. Thus, in *The Thornley* (3), I ordered the Plaintiff to pay costs, saying that he had no sufficient ground for bringing his action. I deem myself, therefore, free to consider the circumstances of the case, and I must say that, considering the collision took place on a most tempestuous night, a night in which in this one place eight vessels were wrecked, the Plaintiff had good reason to think the collision was a mere accident which could not have been avoided, and that he was unduly rash in bringing his action."

Their Lordships, therefore, conceive that the general rule of the Court of Admiralty is in these cases to make no order as to costs, and that in order to justify an exception to that rule it must be shewn that the action was brought unreasonably and without sufficient *primâ facie* grounds. In the present case they cannot say that there were not such grounds. The case is one in which the unsuccessful party might fairly suppose there was ground to impute blame to the other, and seek to have that question tried. Therefore, there will be no costs in the Court below; and as the

(1) Br. & L. p. 82. (2) 2 W. Rob. 236.
(3) 7 Jur. 659.

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party came here to support the decree which he had obtained, there will be no Order as to the costs of this appeal. The Order, therefore, which their Lordships will recommend Her Majesty to make is that the appeal be allowed, that the decree of the Court of Admiralty be reversed, and that in lieu thereof a judgment be made declaring that the collision was the result of inevitable accident, and ordering that the suit be dismissed without costs, and that each party do bear their own costs of this appeal.

Proctors for the Appellants: *Pritchard & Son.*
Solicitors for the Respondents: *Waltons, Bubb, & Walton.*

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THE AUSTRALASIAN STEAM NAVIGATION COMPANY . . . . . } APPELLANTS;

AND

WILLIAM HENRY MORSE AND GEORGE PHILIP MORSE . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Sale of goods of an absent Owner by Master of Vessel—Where and under what circumstances justifiable—What constitutes "necessity" in cases of this kind defined.

4 Asp. & M. 41
4 P.C. 157.
165.
6 P.C. 322.
6 Jur. N.S. 157
6 L.T. N.S. 477

The authority of the Master of a Ship to sell the goods of an absent Owner is derived from the necessity of the situation in which he is placed; and, consequently, to justify his selling, he must establish (1) a necessity for the sale; and (2) inability to communicate with the Owner. Under these conditions, and by force of them, the Master becomes the Agent of the Owner, not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the Owner, in selling the goods, where it is possible to communicate with the Owner.

The possibility of communicating with the Owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the Port from the Owner, the

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* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE JAMES, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

means of communication which may exist, and the general position of the Master in the particular emergency.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before the sale. Where, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the Master to obtain the Owner's instructions. *The Bonaparte* (1), and *The Cargo ex Hamburg* (2), recognised and followed.

THE action out of which this appeal arose was brought in the Supreme Court of *New South Wales* by the Respondents against the Appellants. The Respondents by their declaration alleged in the first count the conversion by the Appellants of nineteen bales of wool, the property of the Respondents, and in the residue of the declaration sued for money had and received, and for money due on account stated. The Appellants pleaded to the first count that the wool was shipped on board of a Vessel of the Appellants called the *Boomerang*, to be carried from *Rockhampton*, in the Colony of *Queensland*, to *Sydney*, and there (excepting certain perils and casualties of the Sea and navigation) delivered to the Plaintiffs; that the Ship in the course of her voyage stranded, and the wool became saturated with sea water; that the Appellants were compelled to take it back to *Rockhampton*, and there, after survey, sold it, as the only proper or safe course to pursue in its then state, for the benefit of the Plaintiffs. To the residue of the declaration the Appellants pleaded payment into Court of £124. 1*s*. 6*d*.

The Plaintiffs replied to the first plea; first, joinder of issue; second, that the wool might at small expense have been dried and re-packed, and forwarded to *Sydney;* and third, as to the second plea, that the money paid into Court was not sufficient.

Issue was joined on the replication.

The action was tried by a special jury before Sir *Alfred Stephen*, Chief Justice, when evidence (part of which had been obtained on Commissions to examine Witnesses in *England* and in *Queensland*, in one of other actions brought by other Owners of the wool, and was, by consent of the parties, read as evidence in the action) was given to the following effect:—

The Plaintiffs were wool producers in *Queensland*, at a station

(1) 8 Moore's P. C. Cases, 459. (2) 2 Moore's P. C. Cases, (N.S.) 289.

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120 miles inland from *Port Mackay*, and in the month of December, 1865, nineteen bales of wool were sent by them to *Rockhampton*, a distance southward of about 250 miles, and at the latter port were transhipped by their Agent on board the steam-vessel *Boomerang*, belonging to the Appellants, for conveyance from *Rockhampton* to *Sydney*, in the Colony of *New South Wales*, a further distance of above 900 miles. The bales were consigned to Messrs. *Willis, Merry, & Lloyd*, Merchants in *Sydney*, for the purpose of shipment to *England*.

The nineteen bales formed portion of a cargo comprising 260 bales of wool, or thereabouts, consigned to nineteen separate Consignees in *Sydney*, and four parcels deliverable to order.

The *Boomerang* on her voyage, about forty-five miles from *Rockhampton*, struck upon a rock and filled, and the whole of her cargo became submerged, and more or less damaged by sea-water. The Cargo was thereupon, with great labour, taken out of the *Boomerang*, transhipped in a steam-vessel, the *Yaamba*, sent from *Rockhampton* for the purpose, and brought back to *Rockhampton*. In the course of transhipment from the *Boomerang* many of the bales of wool unavoidably burst open, and the wool belonging to different Consignees became mixed, and the wool on its return to *Rockhampton*, to which place it was conveyed with reasonable despatch, was dirty, and stank, and was heated and in danger of ignition. The weather was rainy, and there were no stores in the town of *Rockhampton* in which the wool could have been unpacked and dried, and the wool was in immediate peril of increased and serious damage. Under these circumstances, at the instance of the Master, assisted by the advice of the Appellants' Agent at *Rockhampton*, the wool brought back there was surveyed by *Charles Haynes Morgan, Lloyds'* Agent there, together with Captain *Robert Miller Hunter* of the same place, Merchant, who reported that the wool was becoming rapidly heated, and was in such a condition that it could not be re-shipped with safety, and recommended that it should be sold immediately; whereupon, and owing to the urgency of the case, the Cargo, with the exception of two or three parcels, was, by the direction of the Captain of the *Boomerang*, sold at public auction by the Appellants' Agent.

At the trial the Judge submitted the following written questions for the determination of the jury:—First, was the wool in such a state that it could be safely conveyed to *Sydney?* Second, could the Defendants, with the means obtainable by them, have dried, repacked, and forwarded the wool to the port of its destination? Third, if they could have done this at all, could they have done it without incurring an expense considerably exceeding the amount of freight? Fourth, did the Defendants, time and circumstances considered, act for the best, and as wise and prudent men, for the interest of the Plaintiffs? Fifth, had the Defendants, considering all the circumstances of the case, time and opportunity to obtain instructions from the Owners? Sixth, was the Master of the Vessel a participator in the proceedings thus taken, or a consenting party to such proceedings.

The jury answered the first, second, third, and fifth of the above questions in the negative, and the fourth and sixth in the affirmative; and thereupon a verdict was entered for the Appellants.

The Respondents obtained a rule *nisi* to set aside the verdict and for a new trial, on the grounds of misdirection and that the verdict was against the weight of evidence, which was made absolute on the 7th of March, 1870, Sir *Alfred Stephen*, the Chief Justice of the Court who tried the case, dissenting from the opinion of Justices *Hargrave* and *Cheeke*, who formed the majority of the Court.

The Appellants being dissatisfied with the judgment of the majority of the Supreme Court, making absolute the rule *nisi*, presented a petition to the Court, praying for leave to appeal to Her Majesty in Council against the rule, which was refused, and the Appellants' petition discharged with costs, on the ground, that the rule or order did not involve directly, or indirectly, any claim respecting property of the value of £500 sterling. The total amount, however, which the Plaintiffs in the several actions sought to recover as damages from the Defendants (the Appellants), was for the value of 103 bales of wool, estimated at the sum of £1,750 and upwards.

The Appellants afterwards presented a petition to Her Majesty in Council praying for special leave to appeal against the judgment of the Supreme Court; and on the 19th of July, 1870, special leave was allowed, although under the appealable value, as the case involved an important point of mercantile law.

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Sir *R. Palmer*, Q.C., and Mr. *T. D. Archibald*, for the Appellants:—

The judgment of the Supreme Court, making the rule *nisi* obtained by the Respondents for a new trial absolute, was erroneous, and ought to be reversed, and the rule discharged. The questions put to the jury by the Chief Justice on the trial were the proper points for their determination, and the answers given by the jury to them severally and distinctly were conclusive. The real question involved was, whether there was such a pressing necessity for the sale, having regard to the nature and condition of the Cargo, as justified the sale, and the jury very properly determined that question in the affirmative. The jury found that the Defendants could not dry and repack all the wool; the sale, therefore, was inevitable, and, in the circumstances, justifiable, without communicating with the Consignees: *The Gratitudine* (1); *The Karnak* (2); *The Bonaparte* (3); *The Cargo ex Hamburg* (4).

Sir *John Karslake*, Q.C., and the Hon. *A. Thesiger*, for the Respondents:—

The verdict was clearly against evidence, as well as law; and the jury were misled by the questions put to them and directions of the learned Chief Justice on the trial. The necessity for the sale was not put to the jury, but explained by the Chief Justice to have been "highly expedient." That was a misdirection. Neither was the attention of the jury directed to the state of the specific Bales of Wool belonging to the Plaintiff, as distinguished from the other Bales belonging to other Consignees. The cases cited by the Appellant shew that the necessity must be absolute to authorize the Master selling the Cargo. There was, moreover, a fatal omission in not communicating with the Owners or Consignees of the Cargo, which the Master could have done: *The Lizzie* (5); *Atkinson* v. *Stephens* (6); *Ewbank* v. *Nutting* (7); *Freeman* v. *The East India Company* (8).

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May 10.

Judgment having been reserved, was now delivered by

SIR MONTAGUE SMITH:—

This action was brought to recover the value of nineteen bales of wool shipped by the Plaintiffs at a port in *Queensland*, on board

(1) 3 Rob. 240.
(2) Law Rep. 2 P. C. 505–512.
(3) 8 Moore's P. C. Cases, 459.
(4) 2 Moore's P. C. Cases (N.S.) 289-320.
(5) Law Rep. 2 A. & E. 254.
(6) 7 Ex. 567.
(7) 7 C. B. 797.
(8) 5 B. & A. 617.

the Defendants' Vessel, to be carried to *Sydney*, and which were sold by the Master at an intermediate port.

The defence is, that the sale was justified by the necessity of the situation in which the Master was placed with reference to the Cargo.

The Plaintiffs, who were the Owners of the wool, shipped it at *Port Mackay* in a general Ship of the Defendants, called the *Williams*, for *Sydney viâ Rockhampton*, and consigned it to Messrs. *Willis, Merry, & Co.*, who were their Agents at *Sydney*. At *Rockhampton* the wool was transhipped in usual course into another Steamship of the Defendants, the *Boomerang*. The Cargo consisted in all of about 260 bales of wool, belonging to different Owners, consigned to nineteen different Consignees at *Sydney;* besides some parcels deliverable to order.

On her voyage from *Rockhampton*, and about forty-five miles from that port, the *Boomerang* struck on a rock, and filled; the whole of the Cargo was submerged and damaged.

The Ship stranded on Thursday, the 21st of December, and the Cargo was taken out of her and brought back to *Rockhampton*. The greater part of it was landed on the 22nd and 23rd of that month. On the latter day the wool was examined by Surveyors; after the survey, the Master determined to sell, and, on Saturday, the 23rd, he advertised the sale for Tuesday, the 26th. These general facts do not seem to be disputed, and it is not alleged that the Master did not use proper care and diligence in discharging the wool, and in having it examined and surveyed.

The complaint is, that he was not justified by any necessity in selling the wool, and taking on himself to do so without communication with the Owners.

The case was tried at *Sydney* before the Chief Justice and a special jury, and the verdict passed for the Defendants.

There was conflicting evidence at the trial as to the extent and nature of the damage done to the wool, and its condition.

It appeared from the evidence that many of the bales had burst, and the wool had become intermixed; that a great number of bales were heated; that in some fermentation had begun, which, if unchecked by speedy treatment, would destroy the staple of the wool in a few hours, or at most in two or three days. Evidence

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was also given that, to save wool in this condition from destruction, various processes were necessary, viz., unpacking, washing in fresh water, drying, pressing, and repacking in fresh packs, and that facilities could not be obtained by the Master in the small town of *Rockhampton* for this treatment; and, in fact, that no person could be found to undertake the work, even if he had been disposed to pay the heavy expense of it.

There was some opposing evidence on these points; but, after the verdict, it may be taken that the jury gave credit to the case of the Defendants, which was, in substance, that the Sea damage had brought the Cargo into a state in which it could neither be carried on nor stored, and that it would in two or three days have lost nearly all value, unless it could at once be treated in the way above described; that such treatment could not practically be obtained on a large scale, and that, consequently, there was no other course to be taken for the benefit of the Owners, than to sell the wool in parcels to numerous Purchasers, who might be able, individually, to apply the proper treatment to their small lots.

The verdict having passed for the Defendants, a rule *nisi* was granted to set it aside, and for a new trial, on the grounds of misdirection and that the verdict was against the evidence.

This rule was made absolute by two Judges of the Supreme Court of *New South Wales;* the Chief Justice, who tried the action, dissenting; and this judgment is the subject of the present appeal.

The general principles of law are not in dispute, viz., that the authority of the Master of a Ship to sell the goods of the absent Owner is derived from the necessity of the situation in which he is placed; and, consequently, that to justify his thus dealing with the goods, he must establish (1) a necessity for the sale; and (2) inability to communicate with the Owner, and obtain his directions. Under these conditions, and by force of them, the Master becomes the Agent of the Owner, not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the Owner, in the strong act of selling the goods, where it is possible, as hereafter explained, to communicate with the Owner, and ascertain his will.

The summing-up of the Chief Justice was impugned on the ground that the learned Judge did not bring these principles with sufficient distinctness to the attention of the jury: and it was alleged that they were misled by the way in which the case was left to them.

The first specific objection was to the Chief Justice's explanation of the word "necessity;"—it was referred to in the judgment of Mr. Justice *Hargrave*, who said that he considered the jury to have been misled by two circumstances; first, by the explanation of "necessity," as being only equivalent to "a high degree of expediency," "highly expedient," &c.; and, secondly, by the fourth written question, viz., whether the Defendants had acted "as wise and prudent men."

It appears that the Chief Justice did use the expressions thus quoted; but to ascertain in what sense they were used the other parts of his summing-up must be looked at. The Chief Justice, after stating the circumstances which would create a necessity for selling, goes on thus:—

"But it is only in cases of the most pressing necessity that the Master can thus take upon himself to act for the Owners of the Cargo; and if he does this without such a pressing necessity, he and his Owners will be responsible, even though he may have acted in perfect good faith." Then follow the passages complained of:—

"This necessity is equivalent, for the purposes of the present inquiry, to a high degree of expediency; in other words, that course which was clearly highly expedient will be considered to have been pressingly necessary." And, at the conclusion of his summing-up, he says, "the Master cannot dispose of it in any way unless under such a necessity as that already mentioned, and where he can hold no correspondence with the Owner."

The learned Judge, after these observations, left some specific questions on the facts, which the jury found for the Defendants, and added the question (No. 4), to which objection is made;—"Did the Defendants, time and circumstances considered, act for the best, and as wise and prudent men, for the interest of the Plaintiffs?" which the jury answered in the affirmative.

The learned Judges of the Supreme Court, who criticised the

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Chief Justice's explanation of "necessity," did not attempt themselves to define it. It has, undoubtedly, been employed in cases of this kind to express the urgency of the occasion which must exist to justify the act of the Master—but the word "necessity," when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power—what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus, when by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.

The Chief Justice appears to have directed the jury substantially to the above effect. He repeatedly told them that they must be satisfied of "the necessity," "the pressing necessity," for the sale. In adding, "which means that the course taken must be clearly highly expedient," it cannot be presumed that he intended the jury to understand, that, if the sale was merely expedient, the Master would have been right in resorting to it, nor can it be supposed the jury so understood the charge. It could not properly be predicated of the sale that it was "clearly highly expedient" if a better course could have been found. Considering, therefore, the language of the charge as a whole, and the terms of the fourth question, their Lordships think the jury were led to consider the right question (so far as the point now under discussion is concerned) viz., whether there existed a necessity for the sale as the best and most prudent thing to be done for the interest of the Owner of the goods.

A sale of Cargo by the Master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it; for instance, if in this case the wool, which had no value but as an article of commerce, could have been dried and repacked, and then stored or sent on, but at a cost to the Owner clearly exceeding any possible value of it to him when so treated, it would plainly have been the duty of the

Master to sell, as a better course for the interest of the Owner of the property, than to save it by incurring on his behalf a wasteful expenditure. In other words, a commercial necessity for the sale would then arise, justifying the Master in resorting to it.

It was further objected, on the argument at this Bar, that the attention of the jury was not sufficiently directed to the condition of the specific bales of wool of the Plaintiffs as distinguished from the rest; but it seems to their Lordships that their attention must have been directed to the Plaintiffs' wool, although, no doubt, from the circumstances of the case, the trial took very much the shape of an inquiry into the state of the entire Cargo as a mass. Both sides appear to have gone into the whole matter, and the evidence of Witnesses taken in another action with reference to another part of the Cargo was by consent read on this trial. It is plain that the Ship was a general Ship; that the wool belonged to numerous Owners; that all of it was more or less damaged, and that some of it was so intermixed as to render it difficult within the time at the Master's disposal, and the small resources of the Port, to deal with the bales separately; these facts must, properly, have had great weight with the jury, when they came to consider what it was practicable for the Master to do with such a Cargo, and the different parcels of which it was composed.

Their Lordships have now to consider the objections made to that part of the direction of the learned Judge which related to the obligation of the Master to communicate with the Owners.

It is not disputed that the Chief Justice pointedly called the attention of the jury to this obligation. He told them that the Master could not sell the goods "unless under such a necessity as that already mentioned, and where he could hold no communication with the Owners." And after this explanation he put as the fifth question to the jury, "Had the Defendants, considering the circumstances of the case, time and opportunity to obtain instructions by the Owners?" telling them their verdict must be for the Plaintiffs if they found that question in the affirmative, whatever their opinion on the other parts of the case might be.

The possibility of communicating with the Owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early

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sale; the distance of the Port from the Owners; the means of communication which may exist; and the general position of the Master in the particular emergency.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it could be obtained, before the sale. When, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the Master to obtain the Owner's instructions. (See the judgment of this Board by the Lord Justice *Knight Bruce* in the case of *The Bonaparte* (1); the corrected passage is given in the report of *The Cargo ex Hamburg* (2).)

In the present case the sale, if justifiable at all, must have taken place speedily, for the perishable condition of the wool, which alone justified the Master in selling, made it necessary there should be an immediate disposition of it; and the jury, in affirming the necessity of the sale, must be taken so to have found.

The Plaintiffs themselves were the Owners of the wool. They had shipped it on their own account for *Sydney*, where it was to be trans-shipped to *England*. They lived at an inland station, and no means existed for communicating with them before the sale; and upon these facts it was scarcely contended by the learned Counsel at the Bar that the Owners themselves could have been communicated with.

The Master did apply to Messrs. *Rea & Co.*, who acted for some purposes as the Agents of the Plaintiffs at *Rockhampton*, to take the wool on their behalf, but they declined to interfere with it, or with the Master's discretion.

The principal contention on this part of the case was, that the Master ought to have communicated with Messrs. *Willis & Co.*, the Consignees at *Sydney*, or used some endeavours to do so.

In the absence of evidence to the contrary, the presumption would properly arise that the Consignees named in a Bill of lading had an interest in the goods, and ought to be communicated with; but in the present case it is clear that Messrs. *Willis & Co.* had no interest in the wool, and were to act only as the Agents of the Plaintiffs at *Sydney*. The obligation, therefore, to communicate

(1) 8 Moore's P. C. Cases, 459, 473. (2) 2 Moore's P. C. Cases (N.S.), 320.

with them appears to their Lordships to depend on two questions of fact:—

First, whether, from the nature of their agency, they were such Agents as ought to have been communicated with; and, if so—

Second, whether there was time and opportunity, under the circumstances, to consult them before the sale.

With regard to the first of these questions, it is certainly strange, if the obligation to consult Messrs. *Willis & Co.* was intended to be relied on, that although Mr. *Morse* (one of the Plaintiffs) and Mr. *Willis* (the Agent) were both examined *vivâ voce* at the trial, no information whatever was given by them of the nature and scope of this agency. The fair inference arising from this abstinence, and from the evidence afforded by the Letters of Messrs. *Willis & Co.*, shewing what they actually did in the subsequent part of the transaction, as well as from the general course of business with regard to wool consignments, seems to be, that Messrs. *Willis & Co.* were shipping Agents, employed to forward the wool to *England*, and that they were not the general Agents of the Plaintiffs, nor clothed with any authority to act for them in dealing with the wool before its arrival at *Sydney*, and on an emergency of this kind; but, at all events, the nature and character of the agency was, in their Lordships' view, a question of fact for the jury; and it may be assumed, that a special jury of Merchants of *Sydney* were thoroughly competent to deal with it.

On the second question, viz., whether communication with Messrs. *Willis & Co.* was practicable, some of the circumstances to be considered were, that the wool was landed and surveyed on Saturday, the 23rd of December, and that, on its state being ascertained, an immediate sale was resolved upon as being necessary, and fixed for Tuesday, the 26th (the intervening days being Sunday and Christmas Day), and at once advertised. The Ship was a general Ship; there were twenty-three Consignees, most of them at *Sydney*, each having an equal right to the time and consideration of the Master. *Sydney* is 900 miles from *Rockhampton*. No Letter could have reached that place. There was, however, telegraphic communication between the two towns; and much conflicting evidence was given as to the possibility of corresponding by means of it, especially on Sunday and Christmas Day.

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There can be no doubt that the Master is bound to employ the telegraph as a means of communication where it can be usefully done; but, in this case, the state of the particular telegraph, the way it was managed, and how far explanatory messages could be transmitted by it, having regard to the time and circumstances in which the Master was placed, were proper subjects to be considered by the jury, together with the other facts, in determining the question of the practicability of communication.

It was contended for the Respondents that, although the above two questions of fact may have arisen on the evidence, yet that the attention of the jury was not sufficiently directed to them. Their Lordships have not had the advantage of seeing the whole of the summing-up of the learned Judge; but it is apparent, from the course of the trial, that the jury must have been led to consider them. A great deal of evidence was given, as to the state of the telegraph, and the habits of business of the Merchants of *Sydney*, with the sole object of shewing the practicability of communication with Messrs. *Willis & Co.* It appears also from the record that, at the very end of the case at the trial, the Counsel for the Defendants objected to the Chief Justice, that if the Plaintiffs insisted that it was the Master's duty to have consulted "the Consignees or the Plaintiffs," the facts out of which the duty arose should have been specially replied. The Chief Justice overruled the objection, holding that a special replication on the record was not necessary. This discussion clearly shews that the question as to communication with the Consignees was an issue, not only raised, but regarded by the Chief Justice as one to be decided by the jury. In truth, they must have had the point present to their minds during most of the trial, and must have considered it as involved in the question submitted to them.

Undoubtedly, if the Chief Justice ought to have told the jury that, in point of law, the Master was bound to communicate with the Consignees, his direction might be successfully assailed; for he did not so direct them: but their Lordships think that in this case the learned Judge could not properly have taken upon himself so to rule as a matter of law, and, on the contrary, that the questions of fact before referred to were within the proper province of the jury.

A further objection is made to the Judge's summing-up, on the ground that he told the jury "in effect" that, if the Master could not communicate with all the Owners of the Cargo, he might sell without communicating with any. If the learned Judge had really so directed the jury, as a matter of law, their Lordships would have considered that his direction was erroneous; because, undoubtedly, each Owner has a right to the consideration of the Master, and, acting as his Agent, he should do his best to communicate with him. In the case of an Owner who might be near, and easily got at, it certainly would not alone be a sufficient excuse for not communicating with him, that others at a greater distance could not be consulted. But it has not been shewn to their Lordships that the Chief Justice did lay down any such proposition of law. He certainly directed the attention of the jury to the facts that the Cargo was a general one, belonging to numerous Owners, and the difficulty of communicating with all, as circumstances which would, in fact, increase the embarrassment in which the Master was placed. Their Lordships consider that the learned Judge was justified in so doing. A Merchant knows when he embarks his goods in a general Ship that they cannot have the undivided care and attention of the Master. It is obvious, when such a Ship is in distress at a distant Port, from whence communication with all the Owners is impossible, and with any of them difficult, that the task of selecting (where all are entitled to consideration) those with whom he can and should communicate, must add greatly to the Master's labours, and might in some cases require an amount of time and attention which he could not give unless he neglected more pressing duties connected with saving and dealing with the goods. Such a state of things, when it exists, is clearly within the range of the circumstances which the jury may properly be directed to consider in estimating the conduct of the Master.

On the whole, therefore, their Lordships have come to the conclusion that the misdirections imputed to the Chief Justice have not been established, and that the rule for setting aside the verdict ought not to have been made absolute on that ground.

The Chief Justice, who tried the cause, reports that he is satisfied with the verdict, and, therefore, with regard to that part of the rule which seeks to set aside the verdict on the ground that it is

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against the weight of evidence, their Lordships, in accordance with the ordinary rule, would not be disposed to disturb the verdict on that ground unless it appeared to them to be clearly wrong. Their Lordships need only say that they have not been led by the discussion of the case to this conclusion; and, in the result, they will humbly advise Her Majesty to allow this appeal, and to order that the rule making absolute the rule *nisi* for a new trial be set aside, and the original rule be discharged with costs. The Appellants will have the costs of this appeal, and the deposit made by them as security for costs will be returned to them.

Solicitors for the Appellants: *Hill & Son.*
Solicitors for the Respondents: *Wilde, Wilde, Berger, & Moore.*

J. C.* 1872 — *April* 19, 20, 23.

ABRAHAM DENYSSEN, AS SECRETARY OF THE SOUTH AFRICAN ASSOCIATION FOR THE ADMINISTRATION AND SETTLEMENT OF ESTATES . . . . . } APPELLANT;

AND

SYBRAND JACOBUS MOSTERT . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Cape of Good Hope—Roman-Dutch Law—Husband and Wife—Community of Goods—Mutual Will—Revocation by Surviving Spouse—Adiation—Acquiescence.

5 App Cas 123 136

Exposition and effect of the Roman-Dutch Law prevailing in the *Cape of Good Hope*, in respect to a mutual Will made by Husband and Wife.

First, such mutual Will is to be construed as a separate Will; the disposition of each spouse being treated as applicable to his or her half of the joint property.

Secondly, each spouse is at liberty to revoke his or her part of the Will during the co-Testator's lifetime, with or without communication with the co-Testator, or after the co-Testator's death.

The power which a surviving spouse has to revoke a mutual Will, as far as affects half of the property, is taken away upon the concurrence of two conditions: (1) where the Will disposes of the joint property on the death of

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* *Present:*—SIR JAMES WILLIAM COLVILE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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the survivor, the property being consolidated into one mass for the purpose of a joint disposition of it; and (2), if the survivor has accepted some benefit under the Will.

A mutual Will made by Husband and Wife having community of goods, providing for payment of debts, with provision for Children and Grandchildren, and nominating sole and universal heirs:—*Held*, to be revocable by the surviving spouse, who had not adiated or accepted the provisions therein given, so far as affected her property, and that she was entitled to claim her half of the inheritance.

THIS appeal was brought from a judgment of the Supreme Court of the Colony of the *Cape of Good Hope*, in an action wherein the Appellant, in his capacity of Secretary of the *South African Association* for the administration and settlement of estates, was Plaintiff, and the Respondent was Defendant.

The Appellant sued for and on behalf of the Association as the cessionaries of a Mortgage Bond or Deed of hypothecation, dated the 11th of November, 1859, executed by the Respondent in favour of one *Cornelis Mostert*, sen. (since deceased), for securing payment of the sum of £3,750, with interest.

Cornelis Mostert, sen., the Mortgagee, was the Husband of *Elizabeth Jacoba Mostert, née Louw*, to whom he was married in community of property. He was the Owner and cultivated a Farm near *Cape Town*, called "*Valkenberg*." Becoming advanced in years, he quitted agricultural pursuits, and sold his Farm *Valkenberg* by public sale to the Respondent, who was his Nephew and his Son-in-law, having married *Isabella Petronella Hester*, one of his Daughters. After the sale, the Respondent, in the year 1856, became insolvent, according to the law of the Colony of the *Cape of Good Hope;* not having paid the purchase-money for the Farm *Valkenberg*.

Becoming certificated in the year 1859, the Respondent was enabled, by an arrangement between him and *Cornelis Mostert*, sen., and *Sybrand Jacobus Mostert*, sen., the Respondent's Father, to remain or become again the proprietor of the Farm. Under this arrangement, and for securing the purchase-money, the Respondent, by his Attorney, executed in favour of *Cornelis Mostert*, sen., the Mortgage Bond or Deed of hypothecation of the 11th of November, 1859, sued upon by the Appellant.

By this Bond the Respondent hypothecated the Farm *Valkenberg* for securing the sum of £3,750, and for interest thereon at

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the rate of 6 per cent. per annum, with arrears of premiums of assurance which might be due by the Respondent on the premises hypothecated, and after engaging to keep the buildings thereon insured against Fire, the Respondent thereby authorized *Cornelis Mostert*, sen., to pay the premiums of insurance, in the event of the Respondent not doing so.

Sybrand Jacobus Mostert, sen., became by this Bond bound *in solidum* as surety for and joint principal Debtor of the above capital sum, and interest as might become due thereon.

On the 31st of August, 1860, *Cornelis Mostert*, sen., and *Elizabeth Jacoba*, his Wife, made together, in the manner customary in the Colony of the *Cape of Good Hope*, a mutual Will.

This Will, made before a Notary Public, was in Dutch, the language spoken by the Testators and their family. It declared their will to be:—First, to bequeath, as pre-legacy, to the survivor of them (with liberty to accept such legacy or not) the garden or estate then occupied by the Testators, called *Welgedaan*, with all fixtures thereon, and everything which might be brought under the denomination of moveable property, trinkets, and cattle, and which might be, at the death of the first dying of the Testators, upon or in any part of the garden or estate, and in any of the buildings erected thereon, and which belonged to the estate of the Testators, and all that together, for a sum of £3,000 sterling, to be by the survivor of the Testators brought into the estate of the first dying of the Testators for the same. Secondly, the Testators bequeathed (after the death of the survivor of them) to be paid out and satisfied: to their Grandchildren, *John Bernard* and *Cornelis Mostert Bernard* (being children of their then deceased Daughter, *Elizabeth Christina Mostert*, procreated in marriage with *Jan Fredrik Bernard*), jointly the sum of £300 sterling; to their Daughter, *Maria Carolina Mostert*, married to *Jan Fredrik van Reenen*, the sum of £300 sterling; to their Son, *Adriaan Sybrand Mostert*, a sum of £300 sterling; to their Son, *Tobias Cornelis Mostert*, a sum of £300 sterling; to their Daughter, *Isabella Petronella Hester Mostert*, married to the Respondent, *Sybrand Jacobus Mostert*, jun., a sum of £300 sterling; to their Daughter, *Jacoba Anna Mostert*, married to *Jacobus Johannes Meintjes*, a sum of £300 sterling; and to their Son, *Jan Fredrik Mostert*, a sum of £300 sterling; with the stipulation, that in

case one or more of the above-named Legatees (all of whom were likewise instituted as heirs under the Will) should offer any opposition to any one of the stipulations attached to their institution as heirs, and connected therewith, such Legatee or Legatees thus opposing the same as heir or heirs should forfeit all his, her, or their right or title to his, her, or their legacy; and every such legacy was, with regard to such Legatee or Legatees offering opposition as heir or heirs, revoked by the Will, with further stipulation, that every such forfeited and revoked legacy should be considered as belonging to and forming part of the estate, and should serve to increase the inheritance of the heirs generally.

Proceeding to the appointment of heirs, the Testators appointed as their sole and universal heirs:—First, the survivor of the Testators; second, their Son, *Cornelis Mostert;* third, the children of their Daughter, *Elizabeth Christina Mostert,* procreated in marriage with *Jan Fredrik Bernard;* fourth, the Daughter of the Testators, *Maria Carolina Mostert,* married to *Jan Fredrik van Reenen;* fifth, the Son of the Testators, *Adriaan Sybrand Mostert;* sixth, their Son, *Tobias Cornelis Mostert;* seventh, their Son, *Johannes Andreas Mostert;* eighth, their Daughter, *Isabella Petronella Hester Mostert,* married to the Respondent, *Sybrand Jacobus Mostert,* jun.; ninth, the Daughter of the Testators, *Jacoba Anna Mostert,* married to *Jacobus Johannes Meintjes;* and tenth, the Son of the Testators, *Jan Fredrik Mostert,* in equal shares, and in case of predecease of one or more of them, their lawful descendants by representation *per stirpes;* and in all the goods and effects relinquished by the Testators' inheritances and successions, nothing in the world excepted; subject, however, to certain stipulations therein specified (1); and appointed as Executors, Testamentary Administrators of the estate, and Guardians of the minor, and *fidei commissary* heirs, the Testator's Wife and the Appellant Association, reserving "to themselves the power and right thereafter to make such alterations or additions to that their Will as they might wish or desire, either at the foot thereof under their own signature, or by separate deed," a power which they exercised by executing a Codicil the year following regarding the share for excess of inheritance that should fall to their Daughter, *Jacoba Anna Mostert,*

(1) Set forth *in extenso* in the judgment, *post,* pp. 247-8.

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by reason of the stipulations in the Will contained, which such codicil declared, should remain burthened with the entail of *fidei commissum* with all the stipulations and conditions attached to the same.

The Testator, *Cornelis Mostert*, died on the 15th of December, 1862.

His Widow, the surviving Testatrix, together with the Appellant Association, her co-executors, on the 23rd of December, 1862, deposited the joint Will and Codicil with the Master of the Supreme Court in the Colony, and obtained from him the usual certificate or Letters of Administration, certifying that she and the Appellant Association had been duly appointed Executors testamentary, and authorizing them as such to administer her Husband's estate.

On the 21st of January, 1863, the Widow *Mostert*, in exercise of the option given to her by the joint Will of the 31st of August, 1860, wrote to her co-executors declining to accept the pre-legacy of *Welgedaan* and the moveables there, for which the price would have been £3,000, to be brought by her into her Husband's estate. By this Letter she gave directions for the sale, in March, 1863, of the entirety of the pre-legacy for the account of the estate, with the exception of some of the moveable articles which she wished to keep out for herself. She also gave directions with reference to a sale by her late Husband of a piece of land with buildings thereon, in *Breda Street*, to their Daughter, *Jacoba Anna Mostert*, for £1,500, desiring that this sale should be completed, and the whole purchase-money secured to her Husband's estate, and all costs paid out of his estate. She also gave directions for the sale of the different shares in certain Companies which had been found in the estate and were set forth in an inventory, except one share in the Appellant Association. This excepted share she desired might be taken over by her Son, *Jan Fredrik Mostert*, at the value then set upon it in the Books, without any premium.

The Appellant Association, acting on their own behalf as well as for the Widow, as Executors, did not confine their administration to the estate of the Husband (*i. e.* the half of the joint estate), but included the whole of the joint estate, and from June, 1864, to February, 1868, intituled their liquidation and distribution adver-

tisements and accounts, as relating to the estate of *Cornelis Mostert*, sen., and his surviving Widow, or as relating to "the joint estate of the late *Cornelis Mostert*, sen., and his surviving spouse, *Elizabeth Jacoba Louw*, as relinquished by him according to mutual Will of the 31st of August, 1860." The sum claimed and deducted by the Widow and the Appellant Association, her co-executors, for the commission allowed by the Colonial law to Executors for administering the estate was calculated on the whole of the joint estate of the Testators.

The sales by the Appellant Association of the property, moveable and immoveable, of the joint estate, were effected partly before the Widow's Letter of the 21st of January, 1863, and partly in the month of December, 1863, and were principally made in the interval between the 21st of January and the 28th of August, 1863.

On the 28th of August, 1863, the Widow, by an instrument as co-executrix testamentary with the Appellant Association of her deceased Husband, ratified and declared her approval of everything which had already been done and performed by the Appellant Association in the administration of the estate of *Cornelis Mostert*, sen., and which should thereafter be done and performed, and she thereby also granted full power and authority to the Appellant Association in her own name, and also as acting for her, to make transfer and conveyance to the respective Purchasers of immoveable property from the estate.

On the 18th of September, 1863, the Widow addressed a Letter to her co-executors, the Appellant Association, repudiating for the first time the mutual Will of herself and her Husband.

The present action was then brought by the Appellant as representing the Association against the Respondent for the payment of a balance of principal and other moneys due on the mortgage of the 11th of November, 1859, as having been ceded and transferred on the 6th of October, 1864, by private contract by the Appellant Association on behalf of themselves and their co-executrix, the Widow, to the Appellant Association for value received.

The Respondent in his plea insisted on the joint Will as, in effect, releasing him from the whole debt, except only

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the interest during the Widow's life of the unsatisfied part of the capital.

The Appellant Association replied, in effect, that unsecured debts only were referred to by the joint Will, and that the Widow had rejected the benefits conferred on her by the joint Will, and that the Respondent had acquiesced in her repudiation, and was, at all events, liable to pay a moiety of the debt as belonging to the surviving spouse.

It appeared that large sums had been advanced by the Testator, *Cornelis Mostert,* sen., to several of his children, but none to the Respondent or his Wife; and that the Executors in their accounts had treated the Respondent as entitled to the benefit of the provisions of the joint Will as to the debts due to the Testators from their children. The Respondent, though familiar with the Dutch language, alleged that both the Will and the accounts rendered by the Executors were unintelligible to him. The Executors in their liquidation account set aside a fund, which was held by the Appellant Association, to answer the seven legacies of £300 each at the death of the surviving Testator, out of the joint estate, with interest from the day of the death of the Testator, *Cornelis Mostert.*

The cause was heard without a jury, on the 14th, 15th, 16th, 17th, and 22nd of June, 1869, before the Chief Justice, Sir *Sidney Bell,* and *Fitzpatrick* and *Denyssen,* Puisne Judges of the Supreme Court, and the majority of the Court, Mr. Justice *Denyssen* dissenting, on the 16th of November, 1869, declared and adjudged: First, that the Mortgage Bond of the Respondent for £3,750 sterling, upon which the Appellant sued, constituted a debt within the meaning of the several clauses or stipulations of the mutual Will of the 31st of August, 1860, having reference to debts due by the instituted heirs, of whom the Respondent, as married in community of property to *Isabella Petronella Hester Mostert,* was in law one. Secondly, that the Respondent was entitled in this action to assert his legal rights as such instituted and indebted heir under the mutual Will aforesaid, and was not estopped or debarred by reason of acquiescence, or supposed acquiescence, in anything inconsistent with those rights; such acquiescence, or supposed acquiescence, having taken place under circumstances which disentitled the Appellant to rely upon the same

as a waiver by the Respondent of any of his rights. Thirdly, that the surviving Widow, *Elizabeth Jacoba Mostert*, was not entitled to claim, in manner and form as she claimed, and was allowed to claim, a right to take and receive a free half of the joint estate which had been in community between herself and her deceased Husband; but, on the contrary, that *Elizabeth Jacoba Mostert* was bound and obliged, as regarded her half of the joint estate, to give effect to all the clauses and stipulations contained in the mutual Will of the 31st of August, 1860, having reference to debts due by the instituted heirs. Fourthly, that according to the true intent and meaning of clauses and stipulations, the Respondent's inheritance from and out of the estate of the deceased Testator was to be deducted from the principal and interest of his debt, being first applied in payment of arrear interest; that the Respondent remained liable to pay the surviving Widow for her life, interest upon the unsatisfied balance remaining due upon the debt after such deduction; that when the Widow should die the inheritance of the Respondent from and out of her estate was to be again compensated by, or set off against, an equal amount of the debt then remaining due; and that in case the last-mentioned inheritance should be less than the debt, the debt should be wholly freed and discharged from liability for any deficiency which might appear or exist. Fifthly, that the Appellant Association, as the cessionaries of the debt due by the Respondent, took the place of the Widow, and were entitled to whatever rights belonged to her as a surviving spouse, bound by the clauses and stipulations of the mutual Will, but not to any other or greater rights. Sixthly, that it be referred to the Master to take an account of the balance or sum still due by the Respondent upon his debt after deduction, first, of his counter-claim of £42 sterling; second, his Wife's paternal inheritance, as such inheritance would have existed after giving effect to the clauses and stipulations of the mutual Will aforesaid, relative to debts due by the instituted heirs; and third, after deduction of a certain payment of £1,176 sterling made by the Father of the Respondent, who was a surety for debt, and an account of such interest, if any, as was then due and owing by the Respondent upon the balance of his debt after such deductions, and that the Appellant, as such cessionary as aforesaid, should

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take judgment in convention for the amount of such interest as found by the Master with costs (1).

From this judgment the present appeal was brought.

Sir *R. Palmer*, Q.C., Mr. *Rigby*, and Mr. *Wyburgh* (of the *Cape of Good Hope* Bar), for the Appellant:—

The first question that arises is one of acquiescence on the part of the Respondent. The acts of the Appellant Association were throughout *bonâ fide;* the Respondent acquiesced in those acts after he knew, or at least had the fullest means of ascertaining, all the rights he now insists on, and he is precluded and estopped from setting up those rights against the Appellant. The Association whom the Appellant represents would not have taken over, as they did, for full and valuable consideration, the mortgage Bond in question, until the alleged rights of the Respondent had been disposed of, had the Respondent given them, as he was bound to have done, due notice of such claim. But the second question is the really important one, involving as it does not only the power by the Law in force in the *Cape of Good Hope*, of making a joint Will, but when such a Will has been made by Husband and Wife, having community of goods, whether it is competent for the Wife, if she survive her Husband, to repudiate her share in the mutual Will, and assert, as she has done in this case, her common law rights, as unaffected by it. To claim, in fact, and exercise authority over one half of the estate which had belonged in community to her late Husband and herself; and thus claim, as she has done, one-half of the mortgage debt due by the Respondent. Now, we contend, that by the Roman-Dutch Law, which is the law in force in the *Cape of Good Hope*, the Widow, the surviving spouse, was not bound by the mutual Will, and had a right to revoke it, so far as related to her own property, and to claim half of the property of her Husband and herself. By the Roman-Dutch Law a mutual or joint Will is really two Wills on one paper: *Van der Linden*, Inst. of the Laws of *Holland*, B. I., ch. ix., sec. III., pl. 5 [*Henry's* Translation, p. 129]; *Grotius*, Intro. to Dutch Jurisprudence, B. II., ch. xvii.,

(1) See report of case, 2 Buchanan's Cape of Good Hope Cases, 231; and see former branches of the case, 1 Buchanan's Cape of Good Hope Cases, pp. 286, 309.

sec. 24; *Van der Berg's Nederlandsh Advys Boek*, vol. II., *Consultatus*, 210; *Hollandsche*, vol. IV., *Cons.* 43; *Peckius, de Testam. Conjug. Lib.* I., c. 43; *Van der Keessel, Thes.* 298, Bk. II., ch. xvii., sec. 24 [Ed. 1868 by *De Wal*]; *Voet, Lib.* XXIII., *tit.* 4, s. 63; *Ib. Lib.* XXVIII., *tit.* 3, s. 11. From these authorities it appears that the Husband and Wife may both make their Testaments in one and the same paper writing, but the paper is considered to contain two separate Testaments, which each of them may afterwards alter separately, and without the knowledge of the other, before as well as after the death of either of them: *Burge*, Com. on Col. and For. Law, vol. iv., p. 404, where all the authorities are collected. *Brits* v. *Brits' Executors* (1); *Hofmeyr* v. *De Wet* (2), relied upon in the Court below, were cases of adiation, or acceptance of benefit by the survivor under a mutual Will: *Oosthuysen* v. *Oosthuysen* (3) was also a case of adiation and acceptance by the Wife of the benefits of the joint Will: *Scorey's Executors* v. *Scorey* (4). Here, though there was a common testamentary intention, there was not a testacy by one upon the property of the other by consent either express or implied. But, even if the Respondent was not estopped by acquiescence, and if the effect of the Will, regarded as the Will of the Testator, *Cornelis Mostert*, sen., amounted to a discharge of so much of the Testator's half of the debt as should prove to be in excess of the paternal inheritance of the Respondent's Wife, the Appellant Association, as taking the place of the surviving Widow, and as entitled to her rights in regard to such mortgage debt, are entitled to claim from the Respondent one half of such debt, as remained due at the date of the Testator's death, namely, the sum of £1,875, with interest thereon from the 15th of February, 1861.

Sir *John Karslake*, Q.C., and Mr. *H. W. Busk*, for the Respondent:—

The real question in this case is, whether, this being a joint and mutual Will made by Husband and Wife in community of goods, the Wife was capable of repudiating her part in it, and having

(1) 1 Buchanan's Cape of Good Hope Cases, 312.
(2) Ibid. 317.
(3) 1 Buchanan's Cape of Good Hope Cases, 51.
(4) Menzie's Cape of Good Hope Rep. Book 2, p. 231.

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survived her Husband, could repudiate her share and interest in it. Now, the cases referred to on the other side—*Hofmeyr* v. *De Wet* (1), *Brits* v. *Brits' Executors* (2), and *Oosthuysen* v. *Oosthuysen* (3)—and attempted to be distinguished from the present, decide that if two spouses make two Wills in one instrument, in themselves separable so far as language goes, but apparently make the one in consideration of the other; and the one gives the other benefits which by the Roman-Dutch law he or she, but for the Will, would not be entitled to, and that one survives and takes those benefits, the survivor cannot repudiate the mutual Will, but must abide by it; and the mutual Will, so far as it affects the interests of the survivor, becomes his or her irrevocable Will. Here we contend, that the two spouses did in effect consolidate their estates so as to render these joint instruments, even if considered as two Wills, incapable of separation the one from the other. The debts due to the joint estate of the Husband and Wife were in the absolute disposal of the Husband; and by their mutual Will they not only disposed of the matter of those debts, but regulated the disposition of their common estate for the benefit of their children. The Wife surviving could not revoke their mutual Will so far as regarded her share of the common estate, there being nothing in the Will of the nature of a *donatio* from her to her Husband: *Peckius, de Testam. Conjug. lib.* I. c. 43; *Van der Linden,* Inst., B. I., ch. ix., pl. 5, p. 129; *Grotius,* Intro. to Dutch Law, B. II., ch. 17, s. 24; *Ib.* B. I. ch. v., s. 25; *Van der Keessel, Thes.* 298, B. II., ch. xvii., s. 13; *Dekker, Diss. Jur. lib.* I. and VI. ch. 1; *Van Leeuwen, Censura Forensis,* B. III., ch. 11, s. 7; *Van Leeuwen, Comm.* on Roman-Dutch Law, B. II., ch. 3, s. 8 are authorities, by the Roman-Dutch law, for the proposition we contend for. It is also recognised by English law: *Hayes* and *Jarman,* Forms of Wills, p. 582 [Ed. 1863]. In *Dufaur* v. *Pereira* (4) a mutual Will by Husband and Wife of their joint estate was held by the Court of Chancery here binding on the Wife, the survivor, and on her personal estate. Again, in *Lord Walpole* v. *Lord Orford* (5) although that Court

(1) 1 Buchanan's Cape of Good Hope Cases, 317.

(2) Ibid. 312.

(3) 1 Buchanan's Cape of Good Hope Cases, 51.

(4) 1 Dick. 419; 2 Harg. Jurid. Ex. 101.

(5) 3 Ves. 402, 416.

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refused to enforce an agreement for a mutual Will as being uncertain and unfair; it by no means decided that such a Will could not be made or enforced: *Dillon* v. *Parker* (1). Here it was sufficiently established that the Widow adopted and acted under the joint Will, and she was precluded by acquiescence and adiation from repudiating it, even if she had such power. Like the English law of election, she chose to take under the Will and acted under it: *Worthington* v. *Wigginton* (2).

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The consideration of the judgment having been reserved was now delivered by

SIR ROBERT COLLIER:—

This was an action of debt on a Bond brought by the Plaintiff, as acting Executor of the late *Cornelis Mostert*, sen., against the Defendant for the recovery of the sum of £3,750. Among other pleas, not now material to notice, the Defendant pleaded that he had been released from this obligation by the terms of the mutual Will of *Cornelis Mostert* deceased, and his surviving Wife. The Plaintiffs replied by a general denial, and, further, that the Defendant was at all events liable for half the amount of the Bond, the share of the surviving spouse, who had repudiated the mutual Will. Judgment was given for the Defendant by the Chief Justice Sir *Sidney Bell*, and Mr. Justice *Fitzpatrick*,—the majority of the Court,—Mr. Justice *Denyssen* dissenting. The Appellants now contend that they are entitled to judgment for one-half, but only one-half, of the amount of the Bond.

The facts material for the decision of this case are as follows:—

The Bond was executed by the Defendant on the 11th of November, 1859, in favour of *Cornelis Mostert*, jun., whose Nephew he was, and whose Daughter he had married, to secure the purchase-money of a Farm which *Cornelis Mostert*, jun., had sold to him. *Cornelis Mostert* had been married to *Elizabeth Jacoba* his Wife, in community of goods. On the 31st of August, 1860, *Cornelis Mostert*, sen., and his Wife, made what is commonly called "a mutual Will," in the manner customary in the Colony.

The provisions of that Will, as far as they are material to the present case, were these:—

An estate, together with the fixtures, furniture, &c., was left as

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(1) 1 Swan. 359. (2) 24 L. J. (Ch.) 773.

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a pre-legacy to the survivor, on condition of the survivor paying £3,000 to the estate of the predecessor.

Certain specific legacies were given to some of the Children and Grandchildren, to be paid after the death of the survivor of the Testators. Certain sole and universal heirs were nominated, being the survivor of the Testators, and their Children and Grandchildren, mentioned by name, in the whole to the number of ten, all of whom were to take equal shares; and "in case of the predecease of one or more of them their lawful descendants by representation *per stirpes*," subject to the following among other stipulations, namely:—

"First, that in computation with the inheritance of each of the instituted heirs being Children or Grandchildren of the Testators, shall have to be brought all that he or she respectively shall be found to be indebted to the estate of the Testators.

"Secondly, that when and where such debts should happen to exceed the amount of the inheritance from the estate of the first dying, the heir or heirs whom it may concern shall not need to bring up (pay) the excess directly, but that it shall be sufficient for them to remain indebted to the survivor for such excess above inheritance from the estate of the first dying, to be afterwards at the death of the survivor of the Testators brought into computation with his, her, or their inheritance, from the estate of the latter.

"Thirdly, that, in so far as the inheritance from the estate of the first dying falling to the share of one or more of the instituted heirs, might exceed the amount of his, her, or their debts *to the estate*, the excess of inheritance above debts may and shall be paid out to him, her, or them respectively, free and unburdened.

"Fourthly, that all that shall fall to the share of the aforesaid instituted heirs of the Testators, as inheritance from the estate of the survivor of the Testators (and in case, and in so far as the said heirs may have remained indebted to the survivor of the Testators for surplus of debts above the inheritance from the first dying, then after deduction of such debts), shall be and remain as the same is hereby, burdened with the entail of *fidei commissum* in such manner that only the interest or usufruct thereof shall be enjoyed by the heirs of the Testators and their surviving spouses,

the latter so long as they remain unmarried, whilst the capitals themselves shall devolve and go over, after their death, undiminished and unburdened, to their lawful descendants, *per stirpes*. And the Testators did further declare that they have made this *fidei commissary* disposition in order to insure to their aforesaid heirs, as also to their Children and Spouses (the latter so long as they remain unmarried), maintenance and the means of living in case of misfortune, going backwards in pecuniary circumstances or mercantile affairs, Insolvency or Bankruptcy, or other accidents, and especially in so far as they may at present be insolvent."

And other provisions follow which are not so material to the present case.

"Fifthly, if, however, it should come to pass that one or more of the aforesaid instituted heirs of the Testators is or are indebted to the estate of the survivor of the Testators more than the amount falling to his, her, or their share as inheritance therefrom, it is in such case the will and desire of the Testators that any excess of debts above the inheritance falling to the share of such heir or heirs shall be remitted to him, her, or them, as the same is hereby remitted to him, her, or them, *nunc pro tunc*, and that such excess of debts above inheritance shall not be allowed to be taken in the computation of the inheritance of the respective heirs, as it is not the desire of the Testators that the same shall be considered as forming any part of the estate, but that, on the contrary, the inheritances of the respective heirs shall be decreased equally in proportion to the joint amount of the excess of debt above inheritance remitted in manner aforesaid."

Then follows the appointment of Executors in these terms—

"And the Testators declared to nominate and appoint as Executors, Testamentary Administrators of the estate, and guardians of the Union, and *fidei commissary* heirs, to wit: the Testator, his Wife, the present Testatrix, together with the *South African Association* for the administration and settlement of estates, and the Testatrix declares to nominate and appoint her Husband the present Testator alone."

Cornelis Mostert, sen., died on the 15th of December, 1862.

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On the 23rd of December, 1862, a certificate was duly granted by the proper authority to the Widow of *Cornelis Mostert*, and to the *South African Association*, appointing them Executors Testamentary of the Will of *Cornelis Mostert*. On the 21st of January, 1863, the Widow wrote the following letter to the Association:—

"Gentlemen,—With reference to the Will of my late Husband, Mr. *C. Mostert*, senior, I hereby declare that I do not accept the pre-legacy made to me of the garden or estate called *Welgedaan*, situated at the upper end of *St. John Street*, with all the moveable property, trinkets, and cattle which are therein, and request you to sell the same publicly, for account of the estate, in the month of March. I shall supply you with a list of some articles which I wish to keep out for myself.

"With respect to the piece of land with the buildings thereon, situated in *Breda Street*, now occupied by Mr. *J. J. Meintjes*, I desire that the same be without delay transferred to my Daughter *Jacoba Anna Mostert*, married without community of property to the said *Meintjes*, to whom the same was sold by my late Husband for £1,500, when a Mortgage Bond must be passed by my said Daughter for the full amount of the purchase-money, £1,500 bearing interest from ——, in favour of the estate of my Husband, all the expenses of this transfer and of the Mortgage Bond to be passed by my Daughter, also transfer dues, expenses of diagram, and all other expenses in connection with the said transfer and Mortgage Bond, must be paid out of the estate of my Husband.

"With regard to the different shares in companies which have been found in the estate, and are set forth in the Inventory, it is my desire that the same be sold as advantageously as possible for the estate; with the exception, however, of one share in your Association, with regard to which my desire is that the same may be taken over by my Son, *Jan Fredrik Mostert*, at the value now set upon it in the Books, without any premium; and as it will be necessary to take the opinion of the members of the Association upon this subject, I request you will employ your influence as much as possible to have this my wish gratified.

"I am your servant,

"Widow, *C. Mostert*, born *Louw*."

On the 28th of August, 1863, she executed the following docu-

ment:—"I the undersigned, *Elizabeth Jacoba Louw*, Widow of the late Mr. *Cornelis Mostert*, senior, in my capacity as Co-executrix Testamentary with the *South African Association*, &c, of my aforesaid Husband, *Cornelis Mostert*, senior, do hereby declare to ratify and approve of everything which has already been done and performed by the said Association in the administration of the estate of the said *Cornelis Mostert*, senior, and which shall hereafter be done and performed; and also hereby to grant full power and authority to the said Association, in their own name, and also (as acting for me) in my name to make transfer and conveyance to the respective Purchasers of immovable property from said estate, and such transfer shall be considered by me as having been made with my concurrence and knowledge, under obligation of my person and property, according to law.

"*E. Mostert.*"

"*Cape Town*, 28th August, 1863."

On the 18th of September, 1863, the Widow *Mostert* wrote the following Letter:—

"To the Board of Directors of the *South African Association* for the administration and settlement of estates.

"*Cape Town*, 18th September, 1863.

"Gentlemen,—I have resolved to claim only the net half of the joint estate of my late Husband and myself, and which, by virtue of the community of property which has existed between us, belongs to me by law, and to forego all legacies, and also the child's portion bequeathed to me by my late Husband. I now kindly request you, as the administering Executors of the said estate, to liquidate the same as speedily as possible, and to pay me the half share due to me, in cash, as I am not inclined to take in payment any Bonds due by my children.

"I am, your obedient servant,

"*E. Mostert.*"

The Association proceeded to administer the estate, and filed accounts headed as follows:—

"Liquidation and distribution account of the joint estate of the late *Cornelis Mostert* (sole and surviving spouse *Elizabeth Jacoba Louw*, as relinquished by him), according to mutual Will, which

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accordingly is framed by the said *Elizabeth Jacoba Louw* and the *South African Association*, in their capacity as Executors Testamentary, pursuant to Letters of Administration of the 23rd of December, 1862."

And they received the ordinary commission as Executors.

Subsequently, the Executors relinquished all their interest to the Plaintiff, who instituted this suit.

It was contended on behalf of the Appellant, that, under these circumstances, the Widow had a right to revoke the Will as far as it dealt with her own property, and to claim that half of the joint estate of her late Husband and herself, to which she would have been entitled if she had made no Will; that, consequently, she could sue the Defendant for half of the debt owing by him to the joint estate, and transfer the power of suing for it to the Plaintiff.

On the part of the Respondent it was contended, that she had no power to revoke any part of the Will, and that consequently the debt could not be sued for.

The main questions which arise in the case are these:—

First, could the Widow *Mostert* revoke the Will, as far as it affected her share of the property, if she took or elected to take the benefit of its provisions in her favour?

Second, could she revoke it if she did not take or elect to take such benefit?

Third, did she or did she not take or elect to take such benefit?

The views of the Judges of the Supreme Court of the Colony may be shortly stated thus:—

The Chief Justice inclined to the opinion that she had so elected, but held that, even if she had not, she could not revoke the Will. Mr. Justice *Fitzpatrick* held the latter proposition.

Mr. Justice *Denyssen* held that she had not so elected, and, that being so, that she had the power of revoking the Will.

It is not to be expected that much light will be thrown upon the questions which arise in this case by the very scanty authority to be found on the construction of documents in the nature of mutual Wills in this Country, where they are of rare occurrence, and where the laws regulating the relations of Husband and Wife are in many respects different from those of the Colony.

It may be enough to observe that, in the case of *Dufaur* v. *Pereira* (1), Lord *Camden* held that a Husband and Wife, having made a mutual Will, and that the Wife, after her Husband's death, having possessed all his personal estate, and enjoyed the interest thereof during his life, by that act bound her assets to make good all her bequests in the mutual Will, and that her subsequent Will, so far as it broke in upon the mutual Will, was void. And that, in the case of *Walpole* v. *Lord Orford* (2), Lord *Loughborough* refused to confirm the compact of a mutual Will, under circumstances which are thus stated in Mr. Justice *Williams'* Book on Executors, vol. i., p. 122 [6th Ed.]:—

"The Will of *George* Earl of *Orford*, made in 1756, and *Horace* Lord *Walpole's* Codicil of the same date, made in concert, constituted, in effect, a mutual Will. *Horace* Lord *Walpole* died in 1757, without revoking his part of the mutual Will, viz., the Codicil of 1756. *George* Earl of *Orford* died in 1791, when it appeared that he had made a Codicil in 1776; and this, by reason of a reference to his last Will, bearing date in 1752, was construed as a revocation on his part of the mutual Will, viz., the Will of 1756. A case was then raised in equity, that the mutual Will of 1756 became irrevocable on the death of Lord *Walpole* in 1757, though it was admitted to be revocable by either during the joint lives of Lord *Walpole* and Lord *Orford*, with notice to the other. And the judgment of Lord *Camden* in *Dufaur* v. *Pereira* was mainly relied upon in defence of that position. Lord *Loughborough*, however, refused to enforce the compact of the mutual Will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness, of the compact; so that it leaves the principle of Lord *Camden's* decision in *Dufaur* v. *Pereira* wholly unshaken."

The solution of the questions in this appeal must be found in the authorities on the Roman-Dutch law in force in the Colony.

By the Roman law the property of Husband and Wife was separate, and each was entitled to dispose of it at pleasure, either during life or by Will.

The customs of the Dutch introduced community of goods

(1) 1 Dick. 219, the judgment is also reported in 2 Harg. For. Arg. 272, and 2 Harg. Jurid. Ex., 101.

(2) 3 Ves. 402.

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between Husband and Wife, the Husband being the Administrator of the property, and holding the relation of Curator or Guardian to the Wife; and this community of goods was enforced and preserved by a strict prohibition of all contracts relating to property between Husband and Wife. On the death of either, the survivor took half of the property; the other half, in the absence of testamentary disposition, going to the heirs of the deceased.

Both Husband and Wife retained the power of disposing of their respective shares by Will, and any agreement renouncing this power was void. *Voet ad Pandectas, Lib.* xxviii. *tit.* 3, s. 10: "*Ambulatoria est hominis voluntas ad extremum vitæ halitum . . . . ideo revocationem testamenti a jure concessam impedire nequit pactum de non revocandâ vel mutandâ voluntate interpositum.*" By custom the form of mutual Wills was introduced, which, sometimes adopted by persons not related to each other, became the common form of testamentary disposition by Husband and Wife. Much authority (as was to be expected) is to be found bearing upon Wills of this description, and the following general rules of law may be treated as clearly established:—

First, that such Wills, notwithstanding their form, are to be read as separate Wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property.

Second, that each is at liberty to revoke his or her part of the Will during the Co-testator's lifetime, with or without communication with the Co-testator, and after the Co-testator's death.

In support of these general rules of law may be cited *Grotius,* Introduction to Dutch Jurisprudence, B. 1, c. v., s. 25; B. 2, c. 17, s. 24 and notes; *Bynkershoek, Quæsti. Juris Privati, Lib.* III., c. vii.; *Huber's Heden daaghe Reghtsgeleeirheid,* B. II., c. 12; *Schorer* notes *ad Grotius,* B. II., c. 15, s. 9; *Van der Keessel, Thes.* 298, B. II., ch. xvii., s. 24; *Van der Linden,* Institutes of the Laws of *Holland,* B. I., ch. ix., s. 3, pl. 5, p. 129; and other authorities referred to in the judgment of Mr. Justice *Denyssen.*

The general rule being established, it next becomes necessary to ascertain the exceptions to it. They are thus stated by *Grotius,* B. II., c. 15, s. 9 (translated by *Herbert*):—

"When the spouse who dies first has bequeathed any benefit in

favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he accepts such benefits, may not afterwards dispose of his or her share by last Will in any manner at variance with the Will of the deceased."

The substance of this doctrine, though expressed in varying terms, is to be found in the leading authorities from the time of *Grotius* to the present day.

Van Leeuwen, in his *Censura Forensis*, a Book of high authority, after stating the general rule, thus describes the exception, B. III., c. 11, s. 7:—

"*Quæ tamen regula limitatur (præsertim inter conjuges) casu quo duo simul testantes, alter alterum heredem instituit, sub eâ conditione atque onere; ut omnia ea bona quæ post mortem ultimo morientis, ex mutuâ hereditate supererunt, relinquantur huic aut illi. Quo facto supervivens, postquam hereditatem primo morientis adierit, pro suâ etiam parte aliter, aut contra eandem voluntatem mutuam de novo disponere haud potest, mutuo quasi consensu, eorumdem patrimonio consolidato, et ad unicum patrimonium redacto.*"

A passage to the same effect is to be found in *Van Leeuwen's* Commentaries on the Roman-Dutch Law, B. II., c. 3, s. 8.

Their Lordships understand the expression, "*postquam hereditatem primo morientis adierit*"—"after he has *adiated* the inheritance of the predeceaser," as equivalent to the "acceptance of benefits" spoken of by *Grotius*. "Adiation is a term well known to the Roman-Dutch Law, and although Mr. Justice *Connor* in the case of *Oosthuysen* v. *Oosthuysen* (1), may be correct in saying that its technical sense, as applicable to the institution of an heir, may have become obsolete, it appears to be used by *Van Leeuwen* and other Writers, when applied to the survivor of two Co-testators under a mutual Will, in a sense equivalent to the adoption and confirmation of the Will by the acceptance of benefits under it.

Many extracts from the *Hollandsche Consultatien*, translations of which certified by the Registrar of the Supreme Court of the Colony, have been sent to their Lordships, are in accordance with these doctrines; (among them may be cited vol. i., Consultation 50; vol. ii., Consultation 53; vol. iii., Consultation 3; vol. iv., Con-

(1) 1 Buchanan's Cape of Good Hope Cases, p. 51.

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sultation 43). To the same effect are extracts translated and certified in the like manner from *Van der Berg's Nederlandsh Advys Boek.*

The circumstances of the case referred to in Consultation 210 of the second Book of this work very much resemble those of the present.

There the Husband made a Will to which the Wife gave her written assent (the effect of which is stated to be equivalent to her having been a party to a mutual Will), whereby the property of both was given to the Wife for life, with remainder on her death if she should survive and die unmarried, to the blood relations of both in the proportion of two-thirds to those on the side of the Testator, one-third to those on the side of the Testatrix. There was also a provision "that the testing parties concurred in giving to the Testator's brother all that he was in any way indebted to the estate, not wishing that he should be called upon to pay it."

The Widow, for four years after the death of her Husband, remained in possession of the common estate; nevertheless, it was held that she could revoke the Will as far as it related to her half of the joint property, and that she could sue the Testator's Brother for her half of the debt due by him to the estate. It was said, "there is no difficulty in the way of the Widow now repudiating the testament and retaining the half of the common estate by virtue of the community that she has for four years remained in possession of the common estate, for such continuance in possession is not an act from which it can be understood that she wishes to renounce her right of community and take under the Will, for, as survivor, she was entitled to remain in possession until such time as she was called upon to make partition."

Other extracts from *Van der Berg's Nederlandsh Advys Boek*, from the some *Consultations of Utrecht*, and others from *Corens' "decisiones et concilia"* support the doctrine laid down by *Grotius.*

These authorities have been recognised and confirmed by three cases decided in the Supreme Court of the Colony: viz., *Brits* v. *Brits' Executors* (1); *Hofmeyr* v. *De Wet* (2); and *Oosthuysen* v. *Oosthuysen* (3).

(1) 1 Buchanan's Cape of Good Hope Cases, p. 312.

(2) Ibid. p. 317.

(3) 1 Buchanan's Cape of Good Hope Cases, p. 51.

In *Hofmeyr* v. *De Wet*, Sir *John Wilde*, then the Chief Justice, thus lays down the law: "A Husband and Wife may both make their Testament in one and the same paper writing, but the paper is considered to contain two separate Testaments, which each of them may always alter separately, and without the knowledge of the other, before as well as after the death of either of them; but if they have benefited each other reciprocally, and directed how the common estate is to go after the death of the survivor, if the latter has enjoyed or wishes to enjoy the benefit of it, such survivor can make no other last Will or Testamentary disposition of his or her share, unless he or she had rejected the benefit made and ceded the same." In *Oosthuysen* v. *Oosthuysen*, Sir *William Hodges*, then Chief Justice, says, "If the joint spouses have benefited each other, and have jointly and by common consent directed how the estate shall go after the death of the survivor, such survivor cannot, after the adiation of the estate and the enjoyment of the benefit, make another Testament of his or her share of the joint estate (1)."

Much on the same principle it was decided by the Supreme Court of the Colony that an express renunciation by the wife during her husband's life of her right to a half of the joint property, and an agreement to accept in lieu thereof the provisions of his Will, were not binding upon her after his death, but that the right of election remained: *Scorey* v. *Scorey's Executors* (2).

It may be added that Mr. *Burge*, in his Commentaries on Colonial Law, vol. iv., p. 405, lays down the same doctrine.

These authorities (to which more might be added) establish that the power which a surviving spouse generally has to revoke a mutual Will as far as it affects half of the property, is taken away on the concurrence of two conditions.

First, that the Will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it.

Second, that the survivor has accepted some benefit under the Will.

It may be observed that these conditions appear to apply as

(1) 1 Buchanan's Cape of Good Hope Cases, p. 312.

(2) Menzies' Cape of Good Hope Reps., Book 2, p. 231.

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much to a Will made by one spouse with the authority of the other as to a mutual Will in the strict sense of the word, *i.e.*, a Will executed by both.

It next becomes necessary to inquire what authority there is for rejecting the second condition? and holding that a mutual Will "consolidating into a mass" the joint property, is absolutely irrevocable and unalterable by the survivor?

The main authority cited in support of this proposition appears to be a passage in *Peckius, de Testam. Conjug. Lib.* 1, c. 43, which is as follows:—

"*Quoniam verò est alterius loci inquirere, quomodo in universum testamenta sunt revocabilia, quibusque in hoc cautionibus utendum sit: supersedebo illis omnibus huc extra ordinem congerendis, si illud unum addidero consultum quoque esse ad impediendam revocationem, ut alter conjugum cum consensu alterius, de utriusque bonis et eorum parte ad communium utilitatem liberorum solus testetur. Tunc enim dispositio, licet sit revocabilis ex parte testantis, tamen ex parte consentientis transit in contractum et sit irrevocabilis.*"

It is to be observed that the authorities which *Peckius* cites in support of this proposition are not by his own statement of them directly in point, inasmuch as they do not refer to Wills of Husband and Wife, and further, that it is not easy to conceive a Testamentary contract by which one party is bound while the other is left free.

This doctrine, however, of *Peckius* is controverted by *Huber* in his "*Prælectiones*," *lib.* xxviii., *tit.* 3, s. 4, who contends with much force, that it is opposed to the law which prohibits contracts between Husband and Wife for prescribing the manner and extent to which the common property shall be enjoyed by the survivor, and observes: "*Verius tamen videtur, non obstante tali pacto, testamentum posterius factum valere; quià contractus et ultimæ voluntates sunt res ita separatæ, ut hæc per illos impediri non debeant, neque possint, adeo ut ne quidem pactis dotalibus de futurâ successione, testamenti factio cuiquam adimatur.*"

A passage from *Coren's* Obs.: 12, p. 54, cited by the Chief Justice in his judgment, confirms the view of *Huber*. After stating a case of a mutual Will and adiation by the surviving wife, *Coren*

proceeds: "She had given her consent to the Husband's disposing as he did, and then by adiating her husband's inheritance, she bound herself by a *quasi* contract to the observance of his Will." The *quasi* contract arose not upon her consent being given to the making of the Will (as the Chief Justice appears to read the passage), but on her election to accept the benefit of it after her Husband's death.

It is to be observed, however, that *Van Leeuwen* in the extract before quoted from his *Censura Forensis*, in which he lays down "adiation" as one of the conditions necessary to deprive a surviving Spouse of the power of revocation, refers to the above cited passage in *Peckius* as an authority for his position, from which it would seem probable that reading the passage in connection with the context, he understood this condition to be implied. It is further to be observed that *Groenewegen* would appear to take this view, for in his note to the passage of *Grotius* above quoted, he also cites the same passage in *Peckius* as supporting the doctrine laid down in the text. If the passage is to be read with this qualification, it is consistent with all the authorities. Their Lordships have not found any other passage than the above in *Peckius*, in which a gift over of the joint property to children is suggested to be less revocable than such a gift to other relations, or indeed to strangers.

A passage from *Voet, de pactis dotalibus* (*lib.* 28, *tit.* 4, s. 63) has been read, in which he does not mention "adiation" as necessary to deprive a surviving Spouse of the power of revocation; but inasmuch as he cites the extract above given from the *Censura Forensis*, it cannot be assumed that he intends to controvert its authority.

A celebrated cause to which the Will of *Philip*, Duke of *Arshot*, and *Johanna Van Halewyn* his consort gave rise, wherein it was decided that the mutual Will was irrevocable by the survivor, was cited on behalf of the Respondent from *Decker* (*Dissert. Jur.*, *lib.* I., c. 1), who reports his own argument at great length, but the decision somewhat shortly. Whether or not the survivor in that case had adiated does not appear very clearly from *Decker's* report, but adiation may be inferred from the reference to the case in *Van Leeuwen's* Roman-Dutch Law (B. 3, c. 3, s. 8), which is as

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follows: "When two married persons have reciprocally benefited each other, and directed how the goods of the common estate should devolve after the death of the survivor of them, such survivor, having enjoyed the benefit, cannot dispose of his or her share by such rule; and so it was adjudged in the causes upon a Will between *Philip*, Duke of *Arshot*, and Mrs. *Johanna Van Halewyn*, his consort, by the High Court of *Mechlin*."

On the whole, their Lordships are of opinion, that the great preponderance of authority (to say the least of it) supports the doctrine laid down by *Grotius*, and reaffirmed but a few years since by two successive Chief Justices of the Colony, whereby adiation or reception of benefits is treated as one of the conditions without which a surviving spouse is not deprived of the power of revocation.

It remains to apply the law to the facts of the present case.

It has been argued that the joint disposition of the property after the death of the survivor in the present case applies only to part of it, that some provisions of the Will indicate an intention that the dispositions of the respective Testators should apply only to their own shares, and that in this case even adiation would not deprive the Widow of the power of revoking the instrument as far as it applies to her share of the property.

Their Lordships, however, are of opinion, that the Will so deals with the joint estate, that the Widow would not have had the power to revoke any part of it, if she had adiated in the sense before explained.

On the 18th of September, 1863, she wrote a Letter expressly repudiating any benefit under the Will, and declaring her election to take her share of the inheritance to which she would have been entitled if no Will had been made. Their Lordships are unable to concur with the Chief Justice, that before this she had declared her election to adopt the Will. They do not infer this election from her Letter of the 21st of January, 1863, in which she renounces the pre-legacy of the Farm, at the same time expressing to her co-executors her desires with respect to the administration of portions of the property; nor from her acceptance of commission, even if that commission were more than she might be strictly entitled to as Executrix of her Husband's Will; nor from the form of the accounts made out by the Association, which were

certainly intended to be prepared on the footing of the Letter of the 18th of September, whereby she renounced the Will. Their Lordships, therefore, find upon the evidence, concurring herein with Mr. Justice *Denyssen*, that the Widow *Mostert* did not adiate or adopt the Will in the sense of electing to receive the benefits to which she would have been entitled under it; and that being so, they are of opinion, that she had by law a right to revoke it as far as it affected her property, and to claim her half of the inheritance.

The Chief Justice expresses his opinion that "it is much more consistent with justice and fair dealing, and much more conducive to confidence and good feeling between spouses to hold that the survivor has made his or her election in the lifetime of the predeceaser, than that the survivor, having given the predeceaser every reason to believe that the arrangement between them would be operative after his or her death, may after the death of the predeceaser altogether upset it by resorting to his or her rights."

This reasoning applies with equal force to the power of revocation during the life of a Co-testator without communication with him, a power which appears to be placed beyond doubt by the authorities. If the question were to be discussed upon principle independently of authority, it should be borne in mind that, while the power of revocation may be in some cases open to the objections urged by the Chief Justice, yet that to limit it as his judgment would do, might enable Husbands disposed unduly to exercise their marital authority and influence, to coerce their Wives into renouncing irrevocably those rights of inheritance, which it appears the especial policy of the Law of the Colony to protect. But these considerations are for the Legislature. *Bynkershoek*, indeed, speaks with strong disapprobation of abuses of the Law, not infrequent in his time, whereby one Co-testator, whose Testamentary dispositions had been the consideration of those of the other, revoked his part of the Will without communicating with his Co-testator; but *Bynkershoek* treats the right to do this by Law as clear, nor can it be doubted that that great Judge and Jurist would have deemed himself bound to give effect to the law as he had laid it down, whatever may have been his opinion of its policy. Their Lordships have but one duty—to declare what they deem to

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be the law; and for the reasons they have given will humbly advise Her Majesty to reverse the judgment of the Supreme Court of the Colony, and to order that judgment be entered for the Plaintiff for one moiety of the Bond with interest, credit being given for any payments in account which have been made. The Appellant will have the costs of this appeal.

Solicitors for the Appellant: Messrs. *Cole, Cole, & Jackson.*

Solicitors for the Respondent: Messrs. *Venning, Robins, & Venning.*

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JAMES MACLAREN AND JOHN MACLAREN . . . . . } APPELLANTS;

AND

ARTHUR H. MURPHY AND JEREMIAH C. MURPHY . . . . . } RESPONDENTS.

JAMES CONNOLLY . . . . . APPELLANT;

AND

JAMES MACLAREN AND JOHN MACLAREN . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (APPEAL SIDE).

Contract for sale of Timber in possession of Guardian or Garnishee—Construction and effect of.

Action for damages for non-performance of a contract for the sale of certain Spars and Timber, "to be delivered free of charge to-morrow, or as soon as they can be got out of the hands of the Guardian; but the Purchasers not bound to take them if not delivered in one week unless they like." No delivery having been made within the time specified, by reason of the Guardian in possession of the Spars insisting on retaining them in consequence of a Writ of *saisie-arrêt* issued in an action instituted against the ostensible Owner of the Spars and Timber, whose mark they bore, having been served on him, notwithstanding that he was released by subsequent proceedings, and might have legally given them up:—*Held*, that not having done so, the parties contracting for the sale of the Spars and Timber were relieved from the damages awarded by the Court below for the non-delivery thereof, on the ground that the reasonable construction of the words getting "out of the hands of

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* *Present*:—SIR JAMES WILLIAM COLVILE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

the Guardian," was the actual, and not constructive or legal title to the possession, which could alone insure the delivery :—

Held, also, that an action *en garantie*, founded on the former right of action, against the Guardian as *garant*, by the original Contractors for damages for wrongful detention of the Spars and Timber, could not, under the circumstances, be sustained; and the judgment made in such an action, awarding damages, reversed.

THESE appeals were brought from judgments of the Court of Queen's Bench in *Lower Canada*, reversing the judgments of the Superior Court in favour of the Appellants, and condemning the Appellants in the sum of 4,210 piastres, with interest and costs.

In the first appeal the action was brought by the Respondents, the *Murphys*, against the Appellants, the *Maclarens*, to recover damages from them for breach of a contract to deliver certain Spars and Timber.

The declaration stated, in effect, that the Plaintiffs and the Defendants, on the 1st of July, 1864, entered into an agreement in writing for the sale by the Defendants to the Plaintiffs of certain Spars and Timber, to be delivered the following day, or as soon as they could be relieved from a seizure under mesne process, in virtue of which they had been attached, and were in the hands of a Guardian. That the Defendants subsequently informed the Plaintiffs that the Spars and Timber were released from the seizure. That the Plaintiffs, relying on the Defendants' statement, went to large expense in preparing to remove the Spars and Timber, and made contracts for their resale, from which the Plaintiffs would have derived large profits, but that the Defendants had not delivered to the Plaintiffs the Spars or Timber.

The Defendants pleaded the general issue, and an *exception péremptoire en droit*, alleging that they made every effort to deliver the Spars and Timber, but that the Appellant, *Connolly*, claimed them as Garnishee, and the Defendants were unable to obtain *main-levée*, and that this amounted to a *force majeure*, for which the Defendants were not responsible.

The Plaintiffs joined issue on the Defendants' plea.

In the meantime the Defendants brought an action *en garantie* against *Connolly*, which was the subject of the second appeal. Evidence was taken in both actions at *enquête*, and the whole was included in the same record, and the appeals were heard together.

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The facts, of which there was no dispute, were as follows:—

In June, 1864, a quantity of Spars and Timber arrived at *Quebec* which were supposed to belong to one *Meech*, the Spars being marked with his initials. *Meech* was in difficulties, and Messrs. *Roche & Co.*, who were Creditors, on the 21st of June issued a Writ of *arrêt simple* on mesne process, and seized the Spars and Timber, of which *John Rafferty* was appointed Guardian in accordance with the Canadian law. *Rafferty*, on June the 23rd, placed the Spars in the boom of *James Connolly*, who gave him a written acknowledgment that he held it to his order as Guardian. The *Maclarens*, however, intervened in the action against *Meech*, claiming the Spars as being really theirs, and on the 27th of June, having given security for them, obtained an Order from Mr. Justice *Taschereau* that they should be delivered to them upon their paying the costs that had been incurred. Some delay took place in the taxation of these costs, and the Spars meanwhile remained in *Connolly's* boom, and on the 1st of July a second writ of *saisie-arrêt simple* was issued at the suit of Messrs. *Burstall & Co.*, who were also Creditors of *Meech;* and Messrs. *Burstall & Co.* also, at the same time, issued a Writ of *saisie-arrêt en main tierce* against *Connolly*. In execution of the writ of *arrêt simple*, the Bailiff seized the same Spars, and he appointed *Connolly* Guardian under this seizure, who accepted the appointment, as appeared by his signature to the Inventory made by the Bailiff. At the same time the Bailiff served upon *Connolly* the writ of *saisie-arrêt en main tierce.*

On the same day, the 1st of July, 1864, the *Maclarens* entered into a written contract for the sale of the Spars to Messrs. *Murphy* in the following terms:—

"*Quebec*, 1st July, 1864.

"*J. Maclaren & Co.* sells and *Arthur Murphy & Co.* buys—

"478 Red pine Spars, at $35.

" 11 White pine Masts, for $520.

"And 1 Crib white pine, &c., at 15 cents per foot.

"Terms—$\frac{1}{3}$ cash.

"$\frac{1}{3}$ 60 days.

$\frac{1}{3}$ 90 days.

"*M. J. Wilson*, Esquire.

"Paper indorsed by *A. H. M. & Co.*

"Spars, &c., to be delivered outside of Mr. *Connolly's* booms, free of charges, to-morrow, or as soon as they can be got out of the hands of the Guardian, but purchasers not bound to take them if not delivered in one week unless they like."

"(Signed) *J. Maclaren & Co.*

"(„) *Arthur H. Murphy & Co.*"

It was for breach of this contract that the first action was brought.

It did not appear from the evidence whether the contract was made before or after the second seizure, or, if the latter, to which of the two Guardians the contract referred.

On the 2nd of July, the taxation of the costs under the first seizure was completed, and the Spars became deliverable to the *Maclarens* under the Order of Mr. Justice *Taschereau*. The *Maclarens* also, on the same day, procured that one *Forsyth* should be substituted for *Connolly* as Guardian under the second seizure, and *Forsyth* being willing that the Spars should be delivered to the *Maclarens* first, *Connolly* gave to them, on the 4th of July, the following acknowledgment:—

"*Woodfield Harbour*, 4th July, 1864.

"I hold, subject to the order of Messrs. *J. Maclaren & Co.*, *Meech's* lot of red pine spars placed in my hands by the Sheriff, viz., 478 red pine spars, 11 white pine masts, 16 pieces square white pine, 2 pieces square red pine—507 pieces.

"(Signed) *James Connolly.*"

On the same day, July 4th, the *Maclarens* took this paper to the *Murphys*, and told them that the Spars were ready for delivery, and at their request indorsed upon the paper the following Delivery Order:—

"*Quebec*, 4th July, 1864.

"*James Connolly*, Esquire.

"Please deliver the within-mentioned spars, masts, &c., to the order of Messrs. *Arthur H. Murphy & Co.*, free of charges.

"(Signed) *J. Maclaren & Co.*"

The *Murphys* sent a Steamer to take delivery of the Spars, but *Connolly* declined to deliver them, alleging that he was bound to retain under the Writ of *saisie-arrêt en main tierce*. *Connolly*

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afterwards stated in his evidence, that his only motive in refusing was to protect himself from any liability that he might incur as *tiers saisi* if he delivered. Immediately on *Connolly's* refusal the *Murphys* caused a formal protest to be made to the *Maclarens* for non-delivery of the Spars, when the latter said that the cause of the non-delivery was the irregular obstruction put in their way by *Connolly.*

The *Maclarens* then applied to the Court, and on the 7th of July obtained a rule *nisi,* which was made absolute on the 8th of July, against *Connolly,* for the delivery up to them of the Spars and Timber. From this Order *Connolly* appealed, and on the 12th of July Mr. Justice *Taschereau* decided that in consequence of the appeal he could not further interfere, and the Spars and Timber remained in *Connolly's* boom till the next sitting of the Court in term, which was not till September, when the appeal from Mr. Justice *Taschereau's* Order was dismissed with costs, and *Connolly* delivered up the Spars, which the *Murphys* then declined to take, alleging that they had lost large profits through the Appellants not fulfilling their contract, the price of spars in July, 1864, being very high, and the Contract a favourable one.

On the 30th of December, 1865, the case in the first and principal action came on for hearing in the Superior Court, when Mr. Justice *Stuart* gave judgment in favour of the Defendants, the *Maclarens.*

The Plaintiffs having inscribed the action for review before three Judges, it was re-heard on the 5th of March, 1865, before the Justices *Badgley, Stuart,* and *Taschereau,* who confirmed the judgment, Mr. Justice *Taschereau* dissenting.

From this judgment the Plaintiffs appealed to the Court of Queen's Bench for *Lower Canada,* and the appeal was twice argued, first before the Chief Justice *Duval,* and the Justices *Aylwin, Drummond,* and *Mondelet,* and subsequently before the Chief Justice *Duval,* and the Justices *Caron, Drummond,* and *Loranger,* and on the 18th of June, 1869, that Court gave judgment, unanimously reversing the judgment of the Court below, and condemning the Defendants to pay 4,210 piastres damages, and the costs of the Court of First Instance, of the Court of revision, and of the appeal.

The second action was inscribed for *enquête* and hearing on the demand *en garantie*, and on the 6th of February, 1866, was heard on the merits by the Superior Court, Mr. Justice *Stuart* presiding, and the action dismissed with costs, on the ground that the *Maclarens*, the Plaintiffs *en garantie*, had failed to establish any legal cause of action against *Connolly*, the Defendant *en garantie*. An appeal was brought in this suit before the appeal in "*Murphy* v. *Maclaren*" was disposed of, and was heard by the Court of Queen's Bench, consisting of the Chief Justice *Duval*, and the Justices *Caron*, *Drummond*, and *Loranger*, who, the Chief Justice dissenting, on the 18th of June, 1869, reversed the decision of the Superior Court of the 6th of February, 1866, and condemned the Appellant, *Connolly*, to pay the *Maclarens*, the Respondents in that appeal, the sum of 4,210 piastres. This was the same sum as the Court of Queen's Bench had by their judgment in the first appeal ordered to be paid to *Murphy & Co.*

From the judgments so given the present appeals were brought.

Sir *R. Palmer*, Q.C., and Mr. *A. Cohen*, for the *Maclarens*, Appellants in the first, and Respondents in the second appeal:—

The first and principal action in these cases is one of contract, and involves the right construction of the agreement of the 1st of July, 1864, between the Appellants, the *Maclarens*, and the Respondents, the *Murphys*, whereby the *Maclarens* agreed to sell and deliver to the *Murphys* certain spars of Timber therein specified on the following day, or as soon as they could be got out of the hands of the guardian, the purchasers not being bound to take them if not delivered within one week unless they liked. At the time this contract was executed *Connolly*, against whom an action *en garantie* was afterwards commenced, was in possession of the Spars, claiming to hold them as guardian *forcé* by virtue of a writ of *saisie-arrêt simple* issued against the effects of *Meech*, the assumed Owner of the Spars, whose name they bore, in a suit of *Roche and another* v. *Meech*. In the action against *Connolly*, the Appellants, the *Maclarens*, obtained judgment, and the appeal of *Connolly*, now before this Tribunal, is from the judgment so obtained by them. The suit against *Connolly* was the necessary consequence of the proceedings taken by the *Murphys* against us for breach of contract,

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as it was in consequence of *Connolly's* claim to retain the Spars that we were unable to deliver them over to Messrs. *Murphy*, and our contract was simply to deliver the Spars as soon as they could be got out of the hands of the guardian. We maintain here, as we contended below, that that was the true construction of the contract; and it was abundantly proved that we used every exertion to get the Spars out of *Connolly's* hands, but that he refused to deliver them, and retained them in his custody. There was, therefore, no breach of contract on our part, and no action for damages for such ought to have been maintained. The law is clear upon that point, and is fully stated in *Addison* on Contracts, p. 1058, where all the authorities are collected. The Appellants did all in their power to procure from *Connolly* the delivery of the Timber, by intervening in the suit of "*Roche and another* v. *Meech*," and obtaining the substitution of *Forsyth* for *Connolly* as guardian, who was willing to deliver the Spars over to the Respondents, but *Connolly* still persisted in retaining them. *Connolly* was not an Agent for us, and his acts could not make us liable for the breach, though in the event of our being so *Connolly* was clearly liable in damages to us, and the judgment of the Court of Queen's Bench against him in that respect in the action *en garantie* for damages with costs ought to be sustained. In the principal action, against which we now appeal, we insist, as already urged, that the non-delivery of the Spars complained of was not occasioned by any negligence or default on our part, but by *force majeure*, by acts over which we had no control, and for which we are not responsible.

Mr. *Bompas*, for the Respondents, the *Murphys*, in the first appeal :—

Mr. *Everett*, and Mr. *Benjamin*, for *Connolly*, the Appellant in the second appeal:—

These are two distinct actions, and two separate appeals. The first, and principal one, is that in which the Respondents, the *Murphys*, were Plaintiffs, and the Appellants, the *Maclarens*, Defendants; in the second the *Maclarens* were the Plaintiffs, and the Appellant *Connolly* the Defendant. The action in the first case was for breach of contract, that in the second against *Connolly* was

en garantie. In both cases damages were sought, and in both cases awarded. The main case, however, is that which constitutes the first appeal, and arises out of the contract of the 1st of July, 1864. We maintain that we were proved to have sustained the damages awarded to us through the non-fulfilment by the Appellants of their contract. They were justly held by the Court of Queen's Bench to be bound to repay to us the expenses incurred by us in consequence of the representations made to us that the wood, the subject of the contract, was ready to be delivered. The conduct of *Connolly* in no way affected the liability of the Appellants to us for breach of their agreement. He was a Garnishee of the Spars placed under his care by *Rafferty*, who was appointed Guardian when the seizure by *saisie-arrêt simple* was made by the Sheriff in the action of *Roche & Co.* against *Meech.* The exigency of the Writ of *saisie-arrêt simple*, by the law of *Lower Canada*, is to dispossess the Defendant of his property seized, until he can obtain a legal Guardian to produce it to answer the Plaintiffs' demand. Guardians in such cases are of two classes: the Voluntary Guardian produced by the Defendant himself, and who, as a general rule, performs the office of a friend, surrenders the property to the Defendant, and substitutes his own personal responsibility to the Court. The other description of Guardian is the Guardian *forcé*, whose duty it is to keep the actual possession and custody of the property seized. The Defendant *Meech* did not appear, and *Rafferty* was accordingly appointed Guardian *forcé.* As such Guardian, in the interest of all concerned, he applied to a Judge of the Superior Court for leave to put the raft in a place of safety, and an order to that effect was made, whereupon *Rafferty* brought the raft to *Connolly's* Cove, and placed it in his custody to hold subject to his, *Rafferty's*, order. That was the state of things and the position of *Connolly* when the Appellants intervened in the suit of *Roche & Co.* v. *Meech* and obtained an order upon terms for delivery over of the Timber, which was then in *Connolly's* keeping, to the Respondents, the *Murphys.* The terms imposed, so far as the payment of the costs, were not complied with, and no delivery took place. In the meantime the Firm of *Burstall & Co.* having instituted a suit against *Meech*, they procured two Writs of *saisie-arrêt*, both dated the 1st of July, 1864, against the effects of *Meech.* The first of

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these Writs was a *saisie-arrêt simple*, like that already issued on behalf of the Appellants, the *Maclarens*, but the second was of a different nature, being a Writ *saisie-arrêt en main tierce*, addressed to the Sheriff, and by virtue of which he seized the Spars then in the custody of *Connolly*. It was on the same day that the contract for the Timber between the Appellants, the *Maclarens*, and the *Murphys* was entered into, which is the subject of the principal appeal.

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Their Lordships' judgment having been reserved, was now delivered in both appeals by

SIR ROBERT COLLIER:—

The first of these cases was an appeal from the Court of Queen's Bench in *Canada*, reversing the decision of the Superior Court in favour of the Plaintiffs (the Respondents).

The action was brought by the Respondents, who are Merchants in *Quebec*, against the Defendants (the Appellants) also Merchants in *Quebec*, to recover damages for the non-delivery of timber under a contract, which was in these terms:—[His Lordship read the contract, *ante*, p. 264, and proceeded.]

The circumstances under which the contract was made, which are necessary to explain its meaning, are as follows:—

In June, 1864, a quantity of timber arrived at *Cape Rouge*, *Quebec*, marked with the initials of one *Meech*, and which are stated to have been known as "*Meech's* lot." Messrs. *Roche & Co.* who were creditors of *Meech*, on the 21st of June commenced an action against him and issued a writ of *arrêt simple* (on mesne process), in pursuance of which the Timber was seized, and one *Rafferty* was appointed guardian of it, in accordance with the Canadian Law.

Rafferty took the Timber from *Cape Rouge*, to a cove in *Woodfield Harbour*, in the possession of a Mr. *Connolly*, a timber merchant, and delivered it to *Connolly* for safe custody. Whereupon the following documents were signed respectively by *Rafferty* and *Connolly*:—

"*Woodfield Harbour*,
"23rd June, 1864.

"*James Connolly*, Esq.:

"Sir,—Hold raft of red pine spars, marked *C. G. M.*, of which I am guardian, appointed by the Sheriff, in a cause of *Roche and*

Others against *Meech*, subject to my order. Raft supposed to contain between four and five hundred pieces.

"*Jno. Rafferty*,
"Guardian."

"Received the above-mentioned raft, which I will hold subject to Mr. *John Rafferty's* order, upon the usual terms and conditions, and without guarantee of the precise number of pieces.

"*Woodfield Harbour*,
"23rd June, 1864. "*Jas. Connolly.*"

On the 27th of June the Defendants, who claimed to be the true Owners of the Timber, intervened in the action of *Roche and Others* v. *Meech*, and obtained a Judge's order for the delivery of it to them, that on good and sufficient security being given and upon payment by them, as a condition precedent of *frais de garde*, and cove charges, *sauf répétition*, to be duly taxed and allowed, the said raft and spars were to be delivered over to *James Maclaren* and *John Maclaren*, the Intervenants in the present cause.

The costs under this Order were not taxed, and consequently the Timber did not become deliverable under it until the 2nd of July.

On the 1st of July, Messrs. *Burstall & Co.*, also Creditors of *Meech*, issued a writ of *saisie-arrêt simple*, in execution of which the Bailiff seized this said Timber, and appointed *Connolly* "voluntary" guardian of it—*i.e.*, guardian without payment, which appointment was accepted by *Connolly*, who signed the inventory made by the Bailiff. At the same time Messrs. *Burstall* issued another writ termed *saisie-arrêt en main tierce*, directed to the Sheriff of *Quebec*, requiring him "to attach by seizure and arrest in the hands of *James Connolly* . . . . and *James Maclaren* . . . . Garnishees, all sums of money, &c., which they may owe to *Meech*, and all the moveable effects and estate belonging to him, to the value of 2,400 dols. . . . . *Meech* is summoned to appear on the 1st of September, the return day of the writ, and the Garnishees are then required to attend to declare upon oath what effects of *Meech* they now have, or shall or will have in their hands."

It was on this day, "the 1st of July," that the contract sued upon was executed.

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It does not distinctly appear whether it was executed earlier or later in the day than the issuing the writs in the second suit against *Meech*. The Court of Queen's Bench, however, assume that it was made with knowledge of the second as well as of the first seizure, and of the appointment of *Connolly* as Guardian under that second seizure. Their Lordships do not doubt that assumption, which does not appear to have been disputed on either side, to be correct.

Before stating the construction which their Lordships put upon the contract, it is convenient to narrate the circumstances subsequent to it as well as precedent, which bear upon the case. On the 2nd of July the taxation of costs under the first order (in the suit of *Roche & Co.* v. *Meech*) was completed, but they do not appear to have been immediately paid.

On the same day a Mr. *Forsyth* was substituted for *Connolly* as guardian by a Judge's order in the second suit. It is stated that *Forsyth*, who was a friend of the *Maclarens*, was substituted at their instance with a view to facilitate the delivery of the Timber to them.

It does not appear that *Forsyth* made any demand or application to *Connolly* for the delivery of the Timber to him, or that he actually obtained possession of it, or made any attempt to do so.

On the 4th of July, the following document was signed by *Connolly*:—

"*Woodfield Harbour*, July 4, 1864.

"I hold, subject to the order of Messrs. *Maclaren & Co.*, *Meech's* lot of red pine spars placed in my hands by the Sheriff, viz., 478 red pine spars, 11 white pine masts, 16 pieces square white pine, 2 pieces square red pine; 507 pieces.

"*James Connolly.*"

On the same day the Defendants took this paper to the Plaintiffs, and at their request indorsed upon it the following delivery order:—

"*Quebec*, July 4, 1864.

"Please deliver the within-mentioned spars, masts, &c., to the order of Messrs. *Arthur H. Murphy & Co.*, free of charges.

"*T. Maclaren & Co.*"

Connolly, however, refused to deliver the timber. His reasons for this refusal are thus stated by him in his evidence.

He says that he was induced to sign the document above-mentioned by this representation made to him by the Bailiff, accompanied by Mr. *Maclaren*, one of the Defendants. "I was to give up the spars the seizures having been removed."

This statement must be taken to have been made, for neither the Plaintiff nor *Maclaren* was called to contradict *Connolly*, but it was incorrect, because the seizure of Messrs. *Burstall* was certainly still in force. He further says that Mr. *Hearn*, who was his Attorney, and also the Attorney for Messrs. *Roche & Co.*, told him that he would not be safe in delivering the Spars, that upon Mr. *Hearn's* suggestion he instructed him to get a guarantee from Messrs. *Roche*, which was subsequently given. He adds, "If I had not got the guarantee or promise that I should have it, I cannot say whether I would have held the Spars or not. It was in consequence of the *saisie-arrêt* in my hands under which I was garnishee that I held them."

In consequence of the refusal of *Connolly* to deliver the timber, Messrs. *Murphy*, on the 5th of July, signed a protest requiring Messrs. *Maclaren* to deliver it, and declaring that they would hold them responsible for all damages, &c., consequent on the non-delivery.

On the 7th of July, Messrs. *Maclaren*, intervening in the suit of *Burstall* v. *Meech*, obtained from a Judge an order *nisi*, made absolute on the 8th of July, for the delivery to them of the Timber subject to the payment (which does not then appear to have been made), of the costs and charges under the order of the 27th of June in the action of *Roche and Another* v. *Meech*.

Connolly appealed against this Order to the full Court, in consequence of which appeal the Judge declined to make any further order interfering with his possession of the Timber. The appeal stood over for hearing during the long vacation, and was heard on the 6th of September, when it was dismissed. *Connolly* thereupon delivered the Timber to the *Maclarens*, the Defendants, who offered to deliver it to the *Murphys*, the Plaintiffs, they however refused to receive it in consequence of a fall of the price of Timber in the meantime, and commenced the present action.

The question turns upon the construction of the words of the

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contract "to be delivered . . . . to-morrow or as soon as they can be got out of the hands of the guardian."

It appears to have been admitted on the part of the Defendants that they were bound to use due diligence in order to effect this, and on the part of the Plaintiff that they were guilty of no default in this respect.

It was contended on the part of the Respondents, that the duty of the *Maclarens* to deliver the Timber became absolute as soon as the guardianship in the first suit was legally determined, or at all events as soon as *Connolly*, or whoever might be guardian, ceased to have the legal right to hold it as such in either suit—that when *Forsyth* was appointed, *Connolly's* legal right to hold ceased, or that, at all events, it ceased upon the Judge's order of the 8th of July being made. On the part of the Appellants it was contended that the *Maclarens* undertook no more than to deliver the Timber as soon as they in fact got it out of the custody of the guardians, whether the guardian held possession legally or otherwise; that they did not, in fact, get it out of the hands of the guardian into their own, so as to be able to deliver it, till the 6th of September, when they offered to deliver it.

Their Lordships are sensible of the difficulty which frequently arises of defining the meaning of mercantile contracts, wherein, as in the present case, the parties are content to express themselves in loose and inaccurate language, and it is not without some hesitation that they have come to the conclusion that the construction of the contract contended for by the Appellants, the *Maclarens*, is the correct one. When the contract was made both parties to it knew that the Timber was in the hands of a guardian or guardians appointed by law, and (as has been before intimated) their Lordships agree with the Court of Queen's Bench that they must be taken to have known *Connolly* to be the guardian or one of the guardians. The time was uncertain when it could be got out of the hands of the guardian so as to enable the *Maclarens* to deliver it, that time might arrive the next day, or it might not arrive for more than a week, in which latter case the purchaser was protected from loss by being enabled to refuse the timber. Their Lordships think that it is not a reasonable interpretation of the contract, to hold it to mean that the *Maclarens* bound themselves to deliver the timber, upon

the accrual of the legal right to the possession—a right which might involve legal difficulties, and which they could only enforce by action—and that it is rather to be inferred from the common and simple language used that, as between mercantile men, the actual and not the constructive, "getting out of the hands of the guardian," was intended. It appears, therefore, to their Lordships that the Timber was not "got out of the hands of the guardian" within the meaning of the contract until September; that the *Maclarens* were guilty of no default, and are not liable in damages to Messrs. *Murphy*. This view of the case makes it unnecessary to determine whether or not (as has been suggested) *Connolly* was acting fraudulently and in collusion with Messrs. *Roche* or their Attorney. *Connolly's* legal right to detain as guardian terminated when *Forsyth* was appointed in his place, but he had also been served with a writ which required him to hold as garnishee all goods of *Meech* in his possession, and their Lordships think it by no means necessarily to be inferred that he acted fraudulently or collusively, because he did not undertake to determine that *Burstall's* claim to the Timber as the goods of *Meech* was unfounded, and that the order in the former suit for delivery to the *Maclarens* gave them a conclusive title against all the world. Upon the Order being made of the 8th of July *Connolly* would have been protected in giving up the Timber, and it would have been proper of him to do so. His appeal against that order may be regarded as obstructive; nevertheless, in appealing he exercised a legal right, and until the appeal was decided he did, in fact, hold the Timber under a claim to hold it by authority of the law.

It has been suggested that the undertaking by him on the 4th of July to hold to the order of the *Maclarens*, constituted a contract whereby he became their warehouseman or wharfinger, and that thereafter his possession after that date was virtually theirs. Independently, however, of the question whether there was any consideration for such a contract, it appears to their Lordships that *Connolly's* evidence to the effect that he was induced to give the undertaking under a misapprehension caused by a misrepresentation of fact by the bailiff and one of the *Maclarens*, uncontradicted as it is by either of these persons, must be taken to be true; and, if so, although the misrepresentation may not have been

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intentional, it seems to their Lordships that *Connolly* was not bound by this undertaking, and that the character of the possession was not changed by his giving it.

For these reasons their Lordships will humbly advise Her Majesty, that the judgment of the Court of Queen's Bench be reversed, and that of the Court below be affirmed, and the Appellants will have the costs of the appeal.

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Judgment on the appeal of *Connolly* v. *Maclaren*, from *Canada*, was delivered, as follows, at the same time:—

This was an action brought by the Messrs. *Maclaren* against Mr. *Connolly*, "*en garantie*," alleging that, in consequence of his wrongful detention of a raft of Timber, of which they were the Owners, they were unable to deliver it to Messrs. *Murphy*, in pursuance of a contract of sale to them; that Messrs. *Murphy* sued them for breach of contract and recovered damages, whereupon the Defendant was bound, as "*garant*," to indemnify them. Inasmuch as their Lordships have held in the principal suit that Messrs. *Murphy* had no cause of action against Messrs. *Maclaren*, they are of opinion that the foundation of this action fails, without determining whether or not the *Maclarens*, or any persons to whom by sale from them the property in the Timber passed, might have a remedy by original action against *Connolly* for his detention of it. Their Lordships, therefore, will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, and to affirm that of the Court below; the Appellant will have the costs of this appeal.

Solicitors for the Appellants in the first appeal, and the Respondents in the second appeal: *Uptons, Johnson, Upton, & Budd.*

Solicitors for the Respondents in the first appeal: *Bischoff, Bompas, & Bischoff.*

Solicitors for the Appellants in the second appeal: *Clarke, Son, & Rawlins.*

TREFFTZ & SON . . . . . APPELLANTS; J. C.*

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ANTONIO CANELLI . . . . . RESPONDENT. *June* 14.

ON APPEAL FROM THE SUPREME CONSULAR COURT OF CONSTANTINOPLE.

Mercantile contract, construction of—Gratuitous Bailee—Negligence—Laches.

C., a Merchant domiciled at *Alexandria*, being indebted to the Appellants, Merchants carrying on business at *Leipsic*, for the purpose of settling litigation between them deposited with the Respondent (an English Merchant resident at *Alexandria*) certain Bills drawn in his favour as security for the Appellants' debt; the Respondent by the agreement between *C.* and the Appellants constituting himself a voluntary depositee of them, and undertaking to be responsible for them to the Appellants "until the effective encashment of them, which remains intrusted to *C.*":—

Held, that the Respondent was not guilty of a breach of duty under this agreement in allowing *C.* to take the Bills when due, for encashment at his discretion, and was not bound to see that *C.* handed over the money to the Appellants.

IN this case the appeal was brought from a decision of the Supreme Consular Court of *Constantinople*, which reversed a judgment of the Consular Court of *Alexandria*.

The judgment in the Consular Court of *Alexandria* was in favour of the Appellants. The Supreme Consular Court of *Constantinople* reversed that judgment.

The Plaintiff, *Edward Walters*, as representing the Appellants, Merchants at *Leipsic*, in the Consular Court at *Alexandria*, claimed from the Respondent 12,000 francs, or 5,543 florins, about £480, the amount of two Bills of Exchange mentioned in a contract, which was in the Italian language, of which the following is a translation:—

"In the year 1865, on the 21st day of October, at *Alexandria* in *Egypt*.

"By the present private agreement the following has been agreed upon between the undersigned Advocate, *Francesco Salone*,

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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as Agent of the Commercial Firm, *J. T. Trefftz & Son*, of *Leipsic*, as *per* Deed of the 31st of May, 1865, and Mr. *C. B. Chilaiditi*, representing the Commercial Firm, *C. B. Chilaiditi & Co.*, established at *Alexandria*.

"Mr. *Salone* in his above mentioned character making use of the powers granted to him by virtue of the above mentioned power of Attorney, received from Mr. *C. B. Chilaiditi* the following proposition, in order amicably to settle the litigation in this Consular Tribunal of *Greece*, whereby it is sought to compel payment by the Firm, *C. B. Chilaiditi & Co.*, to the House of *J. T. Trefftz & Son*, of the sum of 10,140 silver florins and five cents, for the equal amount of goods consigned on the 15th of March, 1865, besides interest until the complete payment, and also for the judicial costs and charges up to the present date.

"1. *Mon. Chilaiditi* declares himself to be indebted to the House of *J. T. Trefftz & Son* in the sum of 10,505 silver florins and 9 cents, as well for principal as interest, at the rate of 6 per cent. from the 15th of March up to this date, in addition to the sum of 249 francs being legal expenses up to this date, the costs of the present instrument not being included.

"2. In payment of the above-mentioned sum, less the legal expenses, which he will pay by cash, he will deposit into the hands of Mr. *Salone*, in his above-mentioned character, four Bills to his order signed in favour of Mr. *D. Piazzi*, the original Agent of the House of *Trefftz*, as *per* Deed of the 31st of May, 1865, signed *F. Salone, C. B. Chilaiditi*, namely, one of 2,652 silver florins and 80 cents., payable at two months' date, another of 2,679 silver florins and 86 cents, payable at four months' date, a third of 2,707 silver florins and 49 cents, payable at six months' date, and the last of 2,735 silver florins and 69 cents, payable at eight months' date, there are included in these sums the respective interest at the rate of 6 per cent.

"3. In guarantee of these four drafts Mr. *Chilaiditi* deposits into the hands of Mr. *Antonio Canelli*, an English Merchant, residing in this place, who, for this purpose, intervenes in the present instrument, the following Bills of Exchange in his own favour, signed by native Merchants of this place indebted to him, namely :—

"No. 8	One of *Hamudi Kamal*	P. T.	30,243
„ 3	Do. *Ibrahim Deliver*	„	19,093
„ 7	Do. *Maham Effendi Azar*	„	20,397
„ 4	Do. *Abdul Melak* of *Cairo*	„	35,000
			104,733

"4. Mr. *Canelli* constituting himself a voluntary depositary of the above-mentioned Bills of Exchange makes himself responsible for them, or for the amount which they represent, to the House of *Trefftz*, until the effective encashment of them, which remains intrusted to Signor *Chilaiditi*.

"5. Mr. *Salone* in this character accepts the above-mentioned propositions.

"Done this day, month, and year, as above, in triplicate, signed by the parties.

"Mere Depositary.	(Signed)	*A. Canelli.*
	(Signed)	*Costo B. Chilaiditi.*
	(Signed)	*Francesco Avo. Salone.*"

The above contract was put in and proved at the trial before the Consular Court of *Alexandria*, and it further appeared on the Trial, that two of the Bills mentioned in the second paragraph of the contract, not having been paid by *Chilaiditi; Edward Walters*, the Appellants' Agent, demanded payment of them from the Respondent on the ground that by the terms of the contract he had guaranteed the payment of the Bills. The Respondent was examined on his own behalf, and proved that he was a mere gratuitous Bailee of the Bills deposited with him, and that, in accordance with the express terms of his undertaking, he allowed *Chilaiditi* to take the Bills for encashment.

It was admitted that the Respondent gave the Bills deposited with him to *Chilaiditi* for encashment as they became due.

The question in the Courts below was the extent of the liability undertaken by the Respondent under the above contract.

The Consular Court of *Alexandria*, on the 14th of April, 1869, decided in favour of the Appellants. That judgment was reversed by the Supreme Consular Court of *Constantinople* on the 27th of September, 1869. Hence this appeal.

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Mr. *A. Cohen*, for the Appellants:—

There was sufficient consideration to support a promise or undertaking on the part of the Respondent to carry out the terms on which, and the purpose for which, he became depositary of the Bills in question, and the facts proved in the Court below shewed that he had made default in doing so. He was bound to use proper care in keeping the Bills, to keep them till the effectual encashment, and not to give them up to *Chilaiditi* until he was sure that he could cash them, and the money was paid into his or the Appellant's hands. The forbearance was a sufficient consideration. The Plaintiff cannot prove negligence in a case of this nature, the burden of proof, therefore, is shifted on the Defendant: *Pothier, Traité du Contrat* [*Bugnet's* Ed. 1847], *Tom.* V. art. 3, sect. 52; *Code Napoléon*, Art. 1993; *Coggs* v. *Barnard* (1); *Taylor* on Evidence, p. 379, § 347 [5th Ed.].

Mr. *Butt*, Q.C., and Mr. *P. Kent*, for the Respondent:—

Canelli was a mere gratuitous Bailee of the Bills, he received no commission or remuneration of any sort for becoming depositary of the same, and was by the 4th article of the contract bound to deliver them up when demanded by *Chilaiditi* for encashment. He only held them that *Chilaiditi* might not be tempted to use them while in difficulties, and as an evidence of good faith. The Firm of *Trefftz & Son* did not apply for them till many months after the dishonour of *Chilaiditi's* own Bills. It lay upon the Appellants to prove a case of gross negligence if they sought to make the Respondent liable, and without admitting that such negligence, if proved, would render him so, it is sufficient to say that no such negligence, or, indeed, any negligence whatever, on the part of the Respondent was proved.

Judgment was pronounced by

SIR MONTAGUE SMITH:—

This is an appeal from the judgment of Her Majesty's Supreme Consular Court at *Constantinople*, which reversed a judgment pronounced by the Queen's Consular Court at *Alexandria*. The

(1) 1 Smith's L. Cases, 177 [8th Ed.]

action was brought by Messrs. *Trefftz & Son* against Mr. *Canelli* for breach of a contract into which he had entered or intervened, under which certain Bills of Exchange were deposited with him for the purpose of securing the payment of certain other Bills which had been given by a person of the name of *Chilaiditi* to Messrs. *Trefftz & Son*. *Chilaiditi* was indebted to *Trefftz & Son*, and an action had been brought by them against him. That action was discontinued upon *Chilaiditi* giving certain Bills to *Trefftz & Son*, and agreeing to deposit with Mr. *Canelli*, the Defendant, certain other Bills by way of security.

The main question arises upon the proper construction of the agreement under which the Bills given as security were deposited with Mr. *Canelli*. The contract is by no means an intelligible one, and some difficulty has been felt by their Lordships in ascertaining from the words of it what was the real intention of the parties; but it is obvious that the obligation of the depositary cannot be carried further than the language of the contract will warrant, and their Lordships must find, as well as they can from the language used, what was the intention of the parties.

The agreement was made in *Alexandria* on the part of *Trefftz & Son* by an Agent, Mr. *Salone*, and bears date on the 21st of October, 1865. It was made between the two principal parties, and Mr. *Canelli* intervened. The first part of the agreement relates to the action which had been brought and the compromise of it, and the delivery of certain Bills by Mr. *Chilaiditi* to *Trefftz & Son*. Those Bills are referred to in the second clause of the contract, which says, "In payment of the aforesaid sum," that is, the agreed debt, exclusive of the costs, which are to be paid in ready money, "he," that is the Debtor, "will place in the hands of Mr. *Salone*, in his (Mr. *Salone's*) aforesaid capacity, four Bills respectively accepted by him in favour of Mr. *D. Piazzi*, the original Attorney of the Firm of *Trefftz & Son*." Then there is a description of the Bills, the last of them maturing in eight months from the date of the contract. The other clauses contain the obligation, and the only obligation, into which Mr. *Canelli* entered; the third is in these terms: "As security for the said four Bills, Mr. *Chilaiditi* deposits in the hands of Mr. *Antonio Canelli*, an English Merchant residing in this place, who for that purpose becomes a party to

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this instrument (intervenes), the following Bills, drawn in his own favour, and accepted by certain native merchants of this place who stand indebted to him, viz.:"—The Bills are described, and the names of the parties, and the amounts given. Then it goes on: "4th. Mr. *Canelli*, constituting himself the voluntary depositary of the aforesaid Bills, undertakes to be (render himself) responsible for the same, or for the value represented by the same, to the Firm of *Trefftz & Son* until the effectual encashment thereof, which encashment is entrusted to Mr. *Chilaiditi*." Mr. *Canelli* signs in this way, "The depositary only, *A. Canelli*."

Now, two constructions have been suggested of this agreement. Mr. *Cohen*, on the part of the Plaintiffs (the Appellants), maintains that the words "until the effectual encashment" of the Bills meant that the Bills should remain deposited with Mr. *Canelli* until they had been paid, and the money had come into his or Messrs. *Trefftz & Son's* hands. The other construction, supported by the passage following the words I have just read, namely, "which encashment is entrusted to Mr. *Chilaiditi*," is, that the Bills were to be held by the depositary only until the time for effectual encashment came, and were then to be entrusted to Mr. *Chilaiditi* for the purpose of obtaining payment, and that when that had been done, it was contended that the deposit was at an end.

The contract is certainly not very intelligibly expressed, and it becomes necessary to examine its words, to ascertain what interpretation they most naturally bear. If it had stopped at the words, "until the effectual encashment thereof," there would have been strong ground for contending that the parties meant that the depositary should hold the Bills until he got payment of them. But the contract does not stop there. It goes on with the passage I have just read, and to which effect must be given, as well as to the former part. The construction which appears to their Lordships to be that which the words naturally import is, that Mr. *Chilaiditi* was to be entrusted with the possession of the Bills in order to obtain payment; and if that is the meaning of the parties, the responsibility of the Respondent as depositary would end, when the former was so entrusted.

The agreement seems to be hardly susceptible of any other construction than of these two, and it may be observed that both are

sensible constructions; that is, both give an effect to the agreement which is a beneficial one to the Creditors, Messrs. *Treffitz & Son*. One is much more beneficial to them than the other, and would give them a much greater security; but still both give them some security; and the question is to collect, as well as can be done from the language, what it was the parties really meant, and what was the obligation Mr. *Canelli* undertook, because no Court can carry his obligation further than the words to which he has become a party will allow, even although it may be that the agreement is not one which mercantile men would be expected to enter into.

It is suggested by Mr. *Cohen* that there would be no advantage in the agreement if it be construed in the way in which the Respondent's Counsel seeks to construe it; but, as just said, that really is not so. The Bills which were given by Mr. *Chilaiditi* to *Treffitz & Son* matured in eight months from the date of this agreement. The Bills which were deposited as a security, apparently, did not mature for a year and a half after its date. The benefit which was secured to Messrs. *Treffitz & Son* by this agreement was at all events to this extent, that Bills of their Debtor to an amount exceeding the amount of the Bills which he had given to them remained in the hands of a depositary up to and beyond the time when these last became due, and the Debtor was prevented from parting with that property. It remained locked up under this agreement, and they might, by proceedings against Mr. *Chilaiditi* when his own Bills were dishonoured, have very probably obtained in some way the benefit of those which were deposited as security with Mr. *Canelli*.

Their Lordships, therefore, think that a sensible construction may be given of this agreement, and that they best give effect to all the words and the different parts of it, by adopting that which has been put upon it on the part of the Respondent.

If the construction of the Appellants were to be adopted, it would impose upon Mr. *Canelli* a greater obligation than he undertook. He does not undertake to hold the money or to be the depositary of the money. The agreement is, that he will be responsible for the Bills, or for their value, until the effectual encashment thereof. He does not undertake to be a depositary of the money, or that his obligation under this contract shall endure

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for all time. Undoubtedly, a difficulty might arise in the practical working of this agreement, if Mr. *Chilaiditi*, being entrusted with the Bills, presented them and they were dishonoured. Possibly that is a state of things which was not foreseen. The experience of those who have had to deal with mercantile contracts teaches that they are not uncommonly entered into without an apprehension or foresight of all the circumstances which may result from them. It may be that if Mr. *Chilaiditi* had presented the Bills and they were dishonoured, there might have been implied from this contract an obligation on his part to return the Bills to Mr. *Canelli*, and on the latter to retain the custody of them as a continuation of the original deposit. However, it is not necessary to decide that question.

Assuming, then, the construction of the contract to be, that which their Lordships have declared it in their opinion to be, the only remaining question is, whether the Plaintiff has established a breach of the contract so construed.

Now, it appears to their Lordships that it lies upon the Plaintiff to establish that there has been on the part of Mr. *Canelli* some breach of his duty under the contract. There would have been a breach of his duty under it if he had delivered the Bills to Mr. *Chilaiditi* before the time when they ought to have been presented for payment, or if he had delivered them to him for any other purpose than that of obtaining payment. But their Lordships think, upon looking at the evidence in this case, that the Plaintiff has not shewn that there was a breach on the part of Mr. *Canelli* in either of these respects. The evidence is extremely scanty, and their Lordships would scarcely be able to arrive at what were the true facts of the case unless they availed themselves of the judgment which was delivered by the Consul at *Alexandria*. Looking at that judgment, and reading the evidence by the light of it, it sufficiently appears, in their Lordships' view, that the Bills were delivered by Mr. *Canelli* to *Chilaiditi* for the purpose of being cashed, and also that they were paid.

Assuming those to be the facts, that the Bills were delivered by Mr. *Canelli* to *Chilaiditi* for the purpose of being cashed, and that he did obtain payment of them, their Lordships think that there was no breach of duty on the part of Mr. *Canelli*, and that nothing

can be imputed to him which would give a cause of action to Messrs. *Trefftz & Son.*

It was urged by Mr. *Cohen* that Mr. *Canelli* had been guilty of negligence in allowing Mr. *Chilaiditi* to help himself, as it were, to the Bills, by going to the chest where they were kept, and taking them from it. Assuming that there may have been some want of care in that respect, or some undue confidence placed by Mr. *Canelli* in Mr. *Chilaiditi*, that alone would not make Mr. *Canelli* liable, unless Mr. *Chilaiditi* got possession of the Bills for a purpose which the agreement did not warrant. But if it be right to assume upon the evidence, and upon the assumptions in the judgment, that Mr. *Chilaiditi* had these Bills only at the time when they became due, and only for the purpose of getting them paid, the fact that he was allowed to take them himself, and that there might have been some want of care in that respect in allowing him to handle all the Bills, would, their Lordships think, afford no ground of action, when that negligence was not followed by any consequences affecting the interests of Messrs. *Trefftz & Son.*

The Consul at *Alexandria* appears to have construed the contract as their Lordships have done, and certainly not in the way in which Mr. *Cohen* attempted to interpret it at their Lordships' Bar. But the Consul appears to have thought that by implication the agreement imposed an obligation upon Mr. *Canelli*, either to take care that Mr. *Chilaiditi* did receive the money and hand it over to Messrs. *Trefftz & Son*, or to give notice to Messrs. *Trefftz & Son* of the time when the Bills matured, and of his having delivered them to Mr. *Chilaiditi* in order that they might go with him and obtain the money when it was paid. It seems to their Lordships that this is not a necessary, or even a reasonable, implication from this agreement. There are no words which affect to bind Mr. *Canelli* to any such duty, and their Lordships think that there is no laches which amounts to anything like a breach of duty under this agreement, in his not accompanying Mr. *Chilaiditi* when he received the money, or in not giving notice to Messrs. *Tretffz & Son*, or some Agent of theirs, that Mr. *Chilaiditi* had possession of the Bills for the purpose of obtaining payment.

As far as laches is concerned, their Lordships are clearly of

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opinion, that there is far greater neglect on the part of the Appellants themselves than on the part of Mr. *Canelli*. The object of the agreement appears to have been that Mr. *Canelli* should hold these Bills until effectual payment could be obtained. The Bills are described in the agreement, and Messrs. *Treffitz & Son* knew perfectly well, or ought to have known, or taken care to have known, the time when these Bills would have matured. It seems reasonable to expect that they, with a due regard to their own interests, would have taken care to see that Mr. *Chilaiditi*, if he obtained the Bills and the cash for them, would hand over the cash to them. It seems to their Lordships, that they have no right to cast that duty, which was one that they might have been fairly expected to undertake for their own interest, upon Mr. *Canelli*, and make him responsible for the consequences of leaving Mr. *Chilaiditi* in the uncontrolled possession of these Bills.

Their Lordships, therefore, have come to the conclusion, that the Supreme Consular Court at *Constantinople* was right in reversing the judgment of the Consul at *Alexandria*, and they will advise Her Majesty to dismiss this appeal with costs.

Solicitors for the Appellants: *Thomas & Hollams.*
Solicitor for the Respondent: *T. Russel Kent.*

WILLIAM RAINY . . . . . APPELLANT; J. C.* 1872 June 11.

AND

ALEXANDER BRAVO . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE SETTLEMENT OF SIERRA LEONE.

Action for libel—Letter containing libel destroyed by Defendant—Secondary evidence—Variance between defamatory words alleged in declaration and proof—Sierra Leone Ordinance, No. 4 of 1866—Trial by Judge without jury—Amendment of declaration, time to apply for—Discretion of Judge.

In an action of libel the defamatory words set out in the declaration must be proved as laid, and it is a fatal variance if the words as alleged are materially qualified by evidence of words not contained in the declaration, although such words as qualified are still libellous.

The Defendant, after the publication of a libel and before the action was brought, destroyed the Letter containing the libellous words:—*Held*, that, as the defamatory writing was not in existence, secondary evidence of the contents of the Letter by Witnesses who heard it read was admissible, but that the actual words used as laid in the declaration must be proved, and not the substance or impression the Witnesses received of the words, as otherwise the Witnesses, and not the Court or jury, would be made the judges of what was a libel.

Before the declaration was filed the Plaintiff gave notice of his intention to move for a rule for the production of the Letter containing the words of the libel as set out in the declaration. An affidavit in answer by the Defendant stated that he, the Defendant, had destroyed the Letter, but made no objection to the terms of the alleged libel set out in the Plaintiff's affidavit:—*Held*, that the Plaintiff's affidavit being merely for the purpose of the production of the Letter was not admissible as evidence to prove the words of the libel.

Where there is a variance between the declaration and proof the proper time to apply to amend the declaration is at the conclusion of the Plaintiff's case.

A Judge sitting without a jury in a civil action, as provided by the *Sierra Leone* Ordinance, No. 4 of 1866, sect. 11, has power to adjourn or postpone his judgment, or verdict, and the appellate Court will not interfere with his discretion either as to adjourning judgment or allowing an amendment of the declaration, which may be granted after the Judge has began to deliver his judgment.

THIS was an action of libel brought in the Supreme Court of *Sierra Leone* by the Appellant, a Barrister practising as an Advo-

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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cate and Attorney in the Courts in that Colony, against the Respondent, a Police Magistrate in that Colony.

The first and second counts of the Plaintiff's declaration set out the libel as follows:—"Tell *Gilpin*" (meaning thereby that a certain person was to tell one *Gilpin*, who was a Client of the Plaintiff's) "that I have prohibited Mr. *Rainy* from practising in my Court" (meaning thereby that the Defendant had prohibited the Plaintiff from practising in his said profession in the Police Court of *Freetown*), "and there was no necessity for him (*Gilpin*) to employ a Lawyer; but if he required a Lawyer, to employ Mr. *Walcott*" (meaning another Advocate and Attorney-at-law of the said Supreme Court), "who was a clever Lawyer, and, what is more, he is an honest man" (meaning thereby that the Plaintiff was not a clever Lawyer or an honest man): The Plaintiff laid his damages at £3,000.

Before the Plaintiff filed his declaration, he caused a notice of motion to be served on the Defendant's Attorney of his intention to apply to the Court for a rule calling upon the Defendant to shew cause why the Plaintiff should not be at liberty to inspect and take a copy of the Letter written by the Defendant to the Police Clerk, and in which the libel complained of was set out. In this affidavit the libel was set forth precisely as it was subsequently laid in the declaration. In reply to this affidavit, the Defendant, by an affidavit made by himself, swore "that the Letter referred to in the affidavit of the Plaintiff, had been torn in pieces by the Defendant, and the pieces thrown in the Streets."

The Defendant pleaded not guilty; and issue being taken thereon, the action came on for trial on the 29th of November, and the 1st and 2nd December, 1869, before His Honour, *George French*, the Chief Justice of the Supreme Court of *Sierra Leone*, without a jury, according to the provisions of the *Sierra Leone* Ordinance, No. 4 of 1866, sect. 11, which abolished trial by jury in civil actions.

At the trial the Plaintiff conducted his case in person, when the following evidence, as appeared from the Chief Justice's notes relative to the libel, was given on the part of the Plaintiff. *Metzger*, the Police Clerk, stated, "The substance of the part of the Letter which I read out I recollect. It was to this effect: I was to tell *Gilpin* that his case was not a case for a Lawyer,

and that he (the Major) was detained at Government House, and could not come down that day. The Letter said he had heard *Gilpin* had employed Mr. *Rainy* (the Plaintiff), but Mr. *Rainy* was not allowed to practise in his Court until he had apologized for his conduct towards him (the Defendant) whilst he was sitting on the Bench at the Police Court some time before." In another part of his evidence the Witness stated, "I read Letter out because there was a direction in Letter for me to tell *Gilpin* and the people that on account of Mr. *Rainy's* conduct towards Magistrate (the Defendant) he had prohibited him from practising in his Court until he had apologized for his conduct towards him." The Witness further stated, in answer to a question of the Chief Justice: "There was a direction in the Letter to tell *Gilpin* and people about Plaintiff's conduct to Defendant, and Defendant having prohibited him practising in his Court until he had apologized for his conduct." *Lake*, another Witness, stated, "The substance of the Letter was as follows: The Defendant wrote to Police Clerk, *Metzger*, to say he was at Government House, and would not be at Police Court before a certain time, which I don't now recollect; that *Gilpin* need not employ a Lawyer; that it was not necessary. But at all events, if he did so, he was not to employ the Plaintiff, in consequence of his conduct in his Court some days before, until he should have made ample apology; that he could employ Mr. *Walcott*, who was a clever Lawyer, besides an honest man. There was a postscript to the Letter to the effect, 'Read this Letter publicly in Court.'" *Jarrett*, another Witness, stated, "The substance of it was: Tell *Gilpin* I am going to Government House, and will not be back before a certain stated time. That *Metzger* was to tell *Gilpin* he did not require a Lawyer, but that if he did employ one, he was to employ *Walcott*, who was an honest man, and not Mr. *Rainy*, as he had prohibited Mr. *Rainy* from practising in that Court for having insulted him some days previously." *Gilpin*, another Witness, stated: "The Letter said: 'Tell *Gilpin* I am engaged at Government House; his case will be remanded till Wednesday; that he need not employ any Lawyer; but if he is so foolish as to employ any Lawyer, he need not employ *Rainy*, as he came into Court on Saturday and insulted me while on the Bench, and unless he makes an apology in open Court I will

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not allow him to come into the Police Court.'" The affidavit of the Appellant, and the affidavit of the Defendant, hereinbefore referred to, were put in evidence at the trial on the part of the Plaintiff.

No evidence was given on the part of the Defendant, who did not appear either in person or by Counsel at the trial, and no objection was taken by the Court during the trial to the Witnesses speaking as to the substance of the Letter containing the libel.

At the conclusion of the trial, the Chief Justice adjourned the case *sine die* for judgment, and on the 17th of December announced in open Court that he would deliver his judgment on the 21st of that month.

On the 21st of December, 1869, the Chief Justice proceeded to give judgment in the action, and while he was taking exception to the evidence given at the trial by the Plaintiff's Witnesses, as speaking only to the substance of the libel, proposed to the Plaintiff that he should elect to be nonsuited; but the Plaintiff submitted that, instead of being nonsuited, the declaration should be amended to make it correspond exactly with his proof. The Chief Justice refused to permit this, and subsequently declined to hear anything further from the Plaintiff, insisting that it was not proper that the Plaintiff should address him whilst he was giving his judgment. His Honour then gave his verdict or judgment for the Defendant, chiefly on the ground, that the Witnesses spoke to the substance, and not the exact words contained in the Letter.

The Appellant moved the Supreme Court for a rule *nisi* that the verdict be entered for him, or for a new trial in the action, and a rule was subsequently granted for a new trial only.

By an Order of the Supreme Court, bearing date the 30th of March, 1870, the rule for a new trial was discharged with costs.

The present appeal was brought from this Order refusing the rule for a new trial. The Appellant, in his case, submitted, that the judgment ought to be reversed, and a verdict entered for him, with such damages as their Lordships should think fit to award.

The Appellant in person:—

There are three grounds upon which, I contend, the Court below was wrong in law. First, that the libel was proved; and, secondly,

even if the exact words were not proved, and there was a variance between the libel alleged and the evidence, the Judge ought to have allowed leave to amend the declaration; and lastly, that the Judge had no power to adjourn the trial *sine die*.

First, I submit, that the libel set forth in the declaration was sufficiently proved by the Witnesses, and also by the affidavit of the Respondent, who therein admits the libel. No objection was taken at the trial by the learned Judge, who tried the action without a jury, under the *Sierra Leone* Ordinance, No. 4 of 1866, sect. 11, to the Witnesses speaking to their recollection of the substance of the contents of the Letter containing the libel, which was alone sufficient proof, but another Witness, *Gilpin*, deposed to the actual words themselves. The evidence of these Witnesses proved so much of the libel as alleged in the declaration as was necessary to maintain the action, and the Judge was wrong in disregarding such evidence: *Starkie* on Slander and Libel, p. 345 [3rd Ed. by *Folkard*]. Direct evidence could not be obtained, as the Respondent himself destroyed the Letter containing the libel, and that being so, he could not object to secondary evidence of the contents being proved by Witnesses. The Chief Justice in his judgment relied upon *Gutsole* v. *Mathers* (1) as an authority to justify him in rejecting the evidence of the Witnesses, speaking only to the substance of the defamatory words. That case does not apply. There is no decision similar to the present case to be found in the Reports. The only authority approaching the present case is *Layer's Trial* (2). That case, it is true, was an indictment for publishing a treasonable paper not in evidence, but parol evidence of the contents of the paper was allowed. Here the Respondent destroyed the Letter, the evidence of the libel. In such circumstances, according to the rule laid down in *Starkie* on Slander and Libel, p. 449, citing *Gathercole* v. *Miall* (3), *Fryer* v. *Gathercole* (4) and *Johnson* v. *Hudson*, in a note to *Watts* v. *Fraser* (5), where a printed Libel is destroyed, evidence of a corresponding copy is admissible. I submit, that in this case secondary evidence was admissible, and that the learned Judge

(1) 1 M. & W. 495.
(2) 6 St. Tr. 229; Note to *Rex* v. *Watson*, 2 T. R. 203.
(3) 15 M. & W. 319.
(4) 4 Ex. 262.
(5) 7 A. & E. 232.

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improperly rejected the testimony of the Witnesses. The Respondent, in his affidavit, admitted destroying the Letter. Such admission is conclusive, and he could not contradict it if he had appeared at the trial: *Rex* v. *Archer* (1).

Secondly, assuming that there was a variance between the words declared on and the proof, the learned Judge refused the right to amend the declaration. The *Sierra Leone* Ordinance, No. 4 of 1866, sect. 11, provides for the trial of civil actions by a Judge without a jury, and enacts that "the proceedings upon and after such trial, as to the powers of the Court or Judge, the evidence and otherwise, shall be the same as in the case of a trial by jury." [SIR MONTAGUE SMITH:—Similar provision is made by the *Common Law Procedure Act*, 17 & 18 Vict. c. 125, sect. 1.] Under this Ordinance the action was tried by the Chief Justice sitting as a jury, and he has, under the 11th sect. of that Ordinance, the same powers as a Judge of a Court of Record in *England*. Had it been a jury trial I should have applied for leave to amend while the Judge was summing up. [SIR MONTAGUE SMITH:—It is at that stage of the trial allowed sometimes, but only as a matter of special favour.] The proper time for the learned Judge to have intimated his opinion, that variance between the declaration and proof was fatal, was, during or at the end of the trial, when leave could have been obtained to amend, but the Judge could not in his judgment reject the evidence as to proof of the libel, after he had admitted it on the trial. From the course taken at the trial there was no means of discovering that the learned Judge had rejected the evidence of any one of the Witnesses, and, I submit, it was not too late to amend when I applied: *Saunders* v. *Bate* (2).

Thirdly, the learned Judge had no power to adjourn his judgment *sine die*. Sect. 3 of the *Sierra Leone* Ordinance applies only where the Judge from illness or absence of one of the Judges is obliged to adjourn the Court. Had he delivered judgment at once, as in the case of a Judge who tries a case with a jury, on his summing-up, I should then have applied to amend the declaration. Again, he was wrong in refusing to hear me when he was commenting on the evidence at the trial.

(1) Note to *Rex* v. *Watson*, 2 T. R. 203.
(2) 1 H. & N. 402.

Mr. *A. L. Smith*, for the Respondent:—

The Appellant's case entirely fails. First, it appears from the Judge's notes that the substance only of the Letter containing the alleged libel, and not the actual words as laid in the declaration, was spoken to by the Appellant's Witnesses; therefore, in law, the Judge was bound to disregard such evidence, and he has found, as a matter of fact, that the Witnesses only spoke to the substance.

Secondly, it is a well established rule of English law, which law prevails in *Sierra Leone*, that in an action of libel or slander the declaration must not only allege the defamatory words written or said, but proof must be given of the precise words, not the substance only, and a material variance is fatal: *Starkie* on Evidence, p. 632 [4th Ed.] The rule, that words alleged to be defamatory must be stated positively in the declaration, and proved as laid, *Starkie* on Slander and Libel, p. 343 [3rd Ed.], is established in *Wright* v. *Clements* (1), and *Flint* v. *Pike* (2). In *Maitland* v. *Goldney* (3) Lord *Ellenborough* says, "that the Plaintiffs could not entitle themselves to recover unless all were proved." Here there is unquestionably a fatal variance. The libel declared on was a very different libel from the libel proved. The declaration sets out the defamatory words constituting the libel to be these:—"Tell *Gilpin* that I have prohibited Mr. *Rainy* from practising in my Court, and there was no necessity for him, *Gilpin*, to employ a Lawyer; but if he required a Lawyer, to employ Mr. *Walcott*, who was a clever Lawyer, and, what is more, he is an honest man." Now, the Plaintiff's Witnesses prove an entirely different case. What, as appears from the Witnesses' recollection of the contents of the Letter, in addition to the defamatory words set out in the declaration was this: "That the Appellant was not to be allowed to practise in his (the Respondent's) Court unless he apologized for his conduct towards him whilst he was sitting on the Bench of the Police Court some time before." Such a qualification of the words declared on as defamatory, was of vital importance, and the controlling words in the Letter have not been declared on.

Thirdly, as respects the amendment of the declaration, it was too late when the Appellant applied to the Judge, who sat as a jury,

(1) 3 B. & Al. 503.
(2) 4 B. & C. 482.
(3) 2 East, 437.

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when delivering judgment. He should have applied for leave to amend at the end of his case, which the Judge, in his discretion, might have allowed. The rule of this Tribunal is not to interfere with the judicial discretion of a Colonial Court in a question of its forms and practice: *Grant* v. *The Ætna Insurance Company* (1).

Lastly, the Chief Justice had, by the *Sierra Leone* Ordinance, No. 4 of 1866, sect. 3, power to adjourn the Court, for judgment. *Reg.* v. *The Mayor of Clonmel* (2) is an authority that the Court has inherent power to adjourn from time to time.

1872 *June* 12.

The consideration of their Lordships' judgment was reserved, and now delivered by

SIR MONTAGUE SMITH:—

This is an action of libel brought by the Appellant, Mr. *Rainy*, a Barrister practising in the Colony of *Sierra Leone*, against the Respondent, who was the Police Magistrate of *Freetown*, in that Colony. The case was tried before the Chief Justice without a jury, who, after taking time to consider, gave judgment for the Defendant on the ground, that the libel was not proved by the evidence. A rule for a new trial afterwards obtained by the Appellant was discharged, which has led to the present appeal.

The Appellant contends that the judgment is wrong on two grounds. He contends, first, that the libel was proved; and secondly, that if it was not proved and there was a variance, the Judge ought to have amended the declaration; and he incidentally complains of the adjournment as having interfered with an application for an amendment.

The alleged libel is contained in a Letter written by the Respondent to the Clerk of his Court, which it is said was read by the Clerk to several persons. It is alleged in the declaration to be in the following terms:—"Tell *Gilpin*" (meaning the Police Clerk) "that I have prohibited Mr. *Rainy* from practising in my Court, and there was no necessity for him, *Gilpin*, to employ a Lawyer; but if he required a Lawyer, to employ Mr. *Walcott*" (meaning another Advocate and Attorney-at-Law of the said

(1) 15 Moore's P. C. Cases, 516. (2) 9 Ir. C. L. Rep. (N. S.) 267.

Supreme Court), "who was a clever Lawyer, and what is more, he is an honest man." The latter words are thus innuendoed, meaning thereby that the Plaintiff was not a clever Lawyer or an honest man. The Letter was destroyed by the Defendant himself shortly after it was written. Four Witnesses were called to prove the contents of the Letter which had been destroyed. The evidence of the Clerk, *Metzger*, to whom it was addressed, and of two others, was disregarded by the Judge, on the ground that they gave evidence of the substance only of the Letter, and not of the very words.

It is unquestionably true that the words charged to be a libel must be set out in the declaration. If the defamatory writing does does not exist, and secondary evidence is offered of its contents, the words must be proved, and not what the Witness conceives to be the substance or the effect of them; for otherwise Witnesses, and not the Court or a jury, would be made the judges of what was a libel.

The Chief Justice seems to have had a right apprehension of the law, but their Lordships are by no means satisfied that he has not misapplied it. In this case such secondary evidence was admissible as could be obtained from the recollection of the Witnesses who heard the Letter read. They were bound to give the words, as far as they could recollect them, and then the inquiry would be, whether their recollection and accuracy could be trusted, and, whether the words they recollected could be relied upon as giving the material words of the libel. Although in the notes of the Chief Justice, when taken literally, it would appear that the substance and effect of the Letter only was given by the Witnesses, yet it seems to their Lordships that in fact the Witnesses must have been giving, or intended to give, the material words of the Letter as they recollected.

The evidence of the principal Witness, *Joseph Metzger*, as reported by the learned Chief Justice, thus appears upon his notes: "The substance of the Letter which I read out I recollect, it was to this effect;" undoubtedly these words, if taken alone, would import that the Witness was giving merely the effect of the Letter; but their Lordships cannot think, that that is what the Witness was really doing; they consider that what he was really

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attempting to do was to give the words as far as he recollected them, and this view of the evidence is borne out by the mode in which the note of the learned Chief Justice is subsequently taken. For the note goes on: "I was to tell *Gilpin* his case was not a case for a Lawyer, and that he (the Major) was detained at Government House and could not come down that day." Then the note goes on, "The Letter said;" which seems to imply that the Witness was then giving his recollection of the words of the Letter. The Chief Justice's note is in these terms: "The Letter said he had heard *Gilpin* had employed Mr. *Rainy* (the Plaintiff) but Mr. *Rainy* was not allowed to practise in his Court until he had apologized for his conduct towards him (the Defendant) whilst he was sitting on the Bench of the Police Court some time before." Then, in another part of the evidence it is stated, "I read the Letter out because there was a direction in the Letter for me to tell *Gilpin* and the people that on account of Mr. *Rainy's* conduct towards the Magistrate (the Defendant) he had prohibited him from practising in his Court until he had apologized for his conduct towards him." Therefore, the Witness states what was the direction in the Letter, and apparently in the words in which that direction was given, according to the best of his recollection. And again he says, in reply to a question of the Chief Justice, "There was a direction in the Letter to tell *Gilpin* and the people about the Plaintiff's conduct towards the Defendant, and the Defendant having prohibited him practising in his Court until he had apologized for his conduct."

It is not necessary to go through the other Witnesses, but it seems to their Lordships that, taking the whole of the note together, the Witness, *Metzger*, was not merely giving the effect, or the inference that he drew from the language of the Letter, but that he was endeavouring to give, as far as he could, the very words of the writing.

Their Lordships, therefore, are disposed to come to the conclusion that the learned Judge ought not to have wholly dismissed this evidence from his mind in coming to a decision upon the case.

But, assuming that this evidence ought to have been regarded, their Lordships think there was still a fatal variance between the proof and the declaration, on the ground that words greatly modi-

fying those alleged in the declaration are not set out. The libel, as it stands, substantially imputes that the Appellant was prohibited generally from practising in Court, and, as pointed by the innuendo, that he was not an honest man. Their Lordships by no means desire to give an opinion upon the question, whether that innuendo is supported by the writing. The actual words, as proved, are, that the Appellant was prohibited only until he had made an apology for an insult offered to the Respondent. Both the passages may be defamatory, but they are libels of a very different character. When a passage contains in itself a complete charge, and is not modified by other passages in the same Letter, it is not necessary to set out the whole. But it is not so in this case. The omitted words clearly change the complexion of the imputation, and affect the inference sought to be drawn from the reference to the other Attorney, who is described as an honest man. Even, therefore, if the evidence which the learned Judge shut out from his consideration had been regarded, their Lordships are of opinion, that the declaration was not supported by reason of the words of the libel not being correctly set out in the declaration.

The Appellant, who has argued his own case, relied upon an affidavit which he made, and in which he had set out the Letter as it appears in the declaration, as evidence of the words which were really contained in the destroyed writing. And he relies on that affidavit being evidence, because, when the Defendant answered it, he referred to the Letter and did not object to the terms in which it was set out in the Appellant's affidavit. Their Lordships, however, think the learned Chief Justice was right in holding that the words set out in the Plaintiff's affidavit were not so admitted by the affidavit of the Defendant as to render them evidence of the contents of the destroyed writing. The affidavit was made in support of an application for the production of the original document. It states that a Letter had been written, and that it was to the effect given in the affidavit, or to the like effect. The object being not to verify the words of the Letter, but to obtain its production, the answer given by the Defendant in his affidavit was not directed to the contents of the Letter, but simply stated in reply to the application for its production, that the Letter referred to was destroyed. Their Lordships, therefore, think that

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the affidavit, although admissible to shew that some Letter had been written, and, it may be, as some corroborative evidence of the contents, is by no means of that conclusive character that the learned Judge ought to have adopted the words in the Plaintiff's affidavit as the true and complete words of the libel.

Such being the opinion of their Lordships, it is plain that in their view the judgment upon the pleadings and evidence as they stand is correct.

They are now brought to consider the question, which was a great deal discussed at this Bar, of the amendment of the declaration, that is, whether the learned Chief Justice ought not to have allowed the Plaintiff to amend it so as to make it correspond with the evidence of the contents of the Letter which was given by the Witnesses at the trial.

Their Lordships certainly think that, the Respondent having himself destroyed the Letter, an amendment ought to have been allowed, provided that the application for it had been made at the right time, and that, if made, proper conditions had been imposed. The Appellant according to the proper rule of practice ought, in their Lordships' opinion, to have applied for the amendment at the end of his case. At the end of his case it must have been apparent that there was a variance between the evidence of the Witnesses and the statement of the libel in the declaration, and then, before the Judge had pronounced his decision or had begun to consider his decision, was the proper time for the Appellant to have applied to him for an amendment of the declaration. That, however, the Appellant did not do, but took his chance of a decision on the materials which were then before the Judge. However, when the Judge, after having taken time to consider, was delivering his judgment and giving his reasons for it, the Appellant, then perceiving that the judgment was to be against him, applied, for the first time, to the learned Judge to make the amendment. Their Lordships do not say that it was too late for the learned Judge to have exercised the power of amendment, if he had thought fit to do so; but it was a matter entirely within the discretion of the Judge at the trial, whether at so late a period he would make the amendment or not, and the Chief Justice on this occasion declined to make it, but offered the Appellant the choice

of a nonsuit. Their Lordships think that the Appellant was ill-advised in not accepting that nonsuit.

The question really comes to this, whether this Tribunal should now interfere with the discretion so exercised by the learned Judge in refusing to make the amendment. Their Lordships would be at all times most reluctant to interfere with the discretion of the learned Judge, in a case of this kind, when he has exercised it upon a full apprehension of all the circumstances before him; but there is a circumstance in this case which induces them to think that they may properly use on this occasion the power, which they undoubtedly possess, of directing the allowance of an amendment to be made, even at the last moment. Their Lordships are disposed to give the Appellant an opportunity of amending, on terms to be presently stated, on the ground that they think the learned Judge was in error in shutting out altogether the evidence of three Witnesses who prove the contents of the destroyed Letter, and in relying only upon the Witness *Gilpin*. They think that his having shut out the evidence of those three Witnesses from his consideration may have influenced his own mind in the exercise of the discretion which he possessed with regard to the amendment; and, probably, if the learned Chief Justice had taken the same view of that evidence which they have done, he might himself have exercised his power in a different way.

Their Lordships, on the whole, are disposed to give the Appellant the opportunity of again trying the case. It is one in which he complains of a serious injury, and they think, under all the circumstances, he may have the opportunity of trying it, if he thinks fit to do so, on the only terms on which it can be granted. Those terms are, broadly, the payment of all the costs which have been incurred.

Their Lordships, therefore, will advise Her Majesty to direct that the Order of the Supreme Court be varied, and that an Order be made for a new trial, with leave to the Appellant to amend his declaration as he shall think fit, on the terms of the Defendant being allowed to plead *de novo*, and of the Appellant paying the costs of the trial and all subsequent costs already incurred in the Court below.

With regard to the costs of the appeal their Lordships think,

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that they also must be borne by the Appellant. What they propose to advise is an indulgence to him, for he did not apply to amend the pleadings at the proper time, and he refused a nonsuit when he might have had it. The subsequent costs their Lordships think are mainly attributable to what they must deem to be errors on the part of the Appellant in these respects.

Their Lordships, as I have said, will humbly advise Her Majesty to the above effect, but they desire to intimate to the parties that the case appears to be one in which they might do well to agree to a *stet processus*. They cannot judicially advise that course, but they throw it out for the consideration of the parties. The effect of a *stet processus* would be that each party would pay his own costs, including the costs of the appeal; and having made this suggestion their Lordships will delay their report to Her Majesty to give the parties an opportunity of considering it (1).

Solicitors for the Appellant: *Lambert & Burgin.*
Solicitor for the Respondent: *S. Spofforth.*

(1) The Respondent refused to agree to a *stet processus*, and taxed the costs.

HENRY HEBBERT . . . . . APPELLANT;

AND

THE REV. JOHN PURCHAS . . . . . RESPONDENT.

J. C.*
1872
July 25.

IN THE MATTER OF AN APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical Law—Church—Clergyman—Monition, disobedience of—Contempt—Suspension.

Order of Suspension *ab officio et à beneficio* decreed against a Clerk in Orders, the perpetual Curate of a Chapel of Ease to a Parish Church, for persistent contempt in disobeying a Monition, issued to enforce obedience to an Order in Council made in an Ecclesiastical cause, declaring illegal and prohibiting the practice of certain rites and ceremonies, and the use of certain vestments, in the services of the Church.

THIS was an application to enforce obedience by the Respondent to two several Monitions issued under the seal of Her Majesty in Ecclesiastical and Maritime causes, pursuant to an Order in Council of the 16th of May, 1871, whereby the Respondent was admonished from the use of, or sanctioning the use of, the rites, ceremonies, acts, observances, matters, or things, in which he had been pronounced to have offended, which were in the Order in Council enumerated and set forth; and was further condemned in costs, for which also a Monition had been issued and served, and also had not been obeyed.

The Order in Council was made on the 23rd of February, 1871, in an appeal from a judgment by the Dean of the Arches (The Right Hon. Sir *Robert Phillimore*), on the 3rd of February, 1870, in a cause promoted in that Court by Letters of Request from the Bishop of *Chichester*, in which Articles were exhibited and admitted charging the Respondent with having offended against the Laws Ecclesiastical by using and sanctioning the use of certain rites, ceremonies, acts, observances, matters, and things in the course of, and in connection with, the performance of Divine Service in his Church, having special reference to the Vestments

* *Present* :—THE LORD CHANCELLOR (LORD HATHERLEY), LORD CHELMSFORD, THE BISHOP OF LONDON (DR. JACKSON), SIR JAMES WILLIAM COLVILE, and SIR MONTAGUE EDWARD SMITH.

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of the Minister and the position of the Celebrant when consecrating the Sacred Elements, as well as the Elements themselves.

The Monition to abstain (1) was in the terms of the Order in Council, and was in the following form:—

"*Victoria*, by the grace of God of the United Kingdom of *Great Britain* and *Ireland* Queen, Defender of the Faith, To the Rev. *John Purchas*, Clerk, the Perpetual Curate or Minister of the Church or Chapel of *St. James*, at *Brighton*, in our County of *Sussex*, greeting:—Whereas in the above-named appeal, now or lately depending before the Judicial Committee of our Privy Council, the said Judicial Committee did, on the 23rd day of February, 1871, agree to report, and did report to us, their opinion, amongst other things, that you, the said *John Purchas*, ought to be pronounced to have offended in your said Church or Chapel, during or in connection with the performance of Divine Service, against the Statute Law, and the Constitutions and Canons Ecclesiastical of the realm, in respect of certain matters which are hereinafter mentioned; and that a Monition ought to be issued under our seal in Ecclesiastical and Maritime Causes, admonishing you to abstain from the use of, or sanctioning the use of, the rites, ceremonies, acts, observances, matters, or things, as well those in which you were pronounced by the Decree of the Judge of the Arches Court of *Canterbury* of the 3rd of February, 1870, to have offended, as those in which the said Judicial Committee have reported that you had also offended, that is to say, to abstain from the use of, or sanctioning the use of, the following rites, ceremonies, acts, observances, matters, and things,

(1) The Order in Council of the 16th of May, 1871, so far as it amended the Decree or Sentence of the Court below of the 3rd of February, 1870, declining to admit certain Articles therein enumerated, and directing the Respondent to pay the costs in both Courts, is set out in the report on the application for rehearing of the appeal, Law Rep. 3 P. C. 671. The judgment on which it is founded, as well as the case on appeal, being reported Ibid. p. 605. But the entire Order, which includes and specifies the several Articles exhibited, and admitted both by the Arches Court and on appeal by the Judicial Committee, is not set out in either report; it is, however, in substance recited and followed in the Monition set forth above. The Articles themselves, which are referred to in the Order, are severally set out in the judgment of the Dean of the Arches, and will be found reported in Law Rep. 3 A. & E. 66–75, *et seq.*

in which you were pronounced by the said decree of the Arches Court of *Canterbury* to have offended, to wit, in having used and worn, and authorized to be worn, a certain Vestment, called a *Cope*, at other services than that of the Communion Service; and in having used and worn, and authorized to be worn, Vestments, described as *Albs*, with Patches, called Apparels, Tippets of a circular form, *Stoles*, *Dalmatics*, and *Maniples;* and in having formed, or caused to be formed, certain processions; and in having caused yourself to be censed when at the Communion Table, previous to the commencement of the Communion Service, during the reading of which the lighted Candles were extinguished, and which were again lighted during the reading of the Gospel; and in having sprinkled, or caused to be sprinkled, with water, and blessed, or caused to be blessed, Palm branches, and distributed the same to those present; and caused to be formed a procession round the interior of the Church; and in having caused persons called Acolytes, and a Crucifer, bearing a Crucifix, to stand or kneel around you; and in having taken from the Holy Table a vessel filled with black powder, and blessed the same, and rubbed a portion thereof on the foreheads of certain persons: and in having censed, or caused to be censed and sprinkled, or caused to be sprinkled with Water, previously blessed, a number of Candles, and lighted and distributed the said Candles to members of the Congregation; and in having caused a small Bell to be rung divers times during the service of the Holy Communion; and in having caused to be said or sung before the reception of the Elements in the said service a Hymn, or Prayer, commonly known as the "*Agnus*," which said Hymn or Prayer is appointed to be said at the conclusion of the said service; and in having given notice in Church that there would be a Mortuary celebration, and in having subsequently repeated, in the Communion Service, the words, 'O God, whose property is ever to have mercy and to forgive, be favourable unto the soul of this Thy servant,' thereby meaning the soul of the deceased person; and in having made, received, or admitted a new Acolyte, at the usual hour for, and immediately before Evening Service, in the presence of the congregation assembled to hear Divine Service, by causing him to kneel before the Holy Table, and reading some words out of a Book, and making

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the sign of the Cross over him, and successively putting into his hands a Candlestick and decanters; and in having censed, or permitted to be censed, a Crucifix, placed on the Holy Table during Divine Service; and in having used lighted Candles on the said Table during the celebration of the Holy Communion, when not wanted for the purpose of giving light; and in having used, or permitted to be used, Incense, for censing persons and things; and in having mixed in and during the Communion Service, and as part of the ceremonial thereof, Water with the sacramental Wine, and permitted and sanctioned such mixing; and in having elevated the *Paten* and Cup above your head, and prostrated yourself, or knelt, during the Prayer of Consecration; and in having elevated the alms contributed at the Offertory, and after placing the same for a moment on the Holy Table, forthwith removed the same, and handed them to an Attendant, who placed them on the Credence Table; and in having used lighted Candles when not wanted for the purpose of giving light, and caused the same to be borne about, moved, set down, and lifted up at certain times: and in having placed, or caused to be placed, on the Holy Table, a large metal Crucifix, and covered and uncovered the same, and bowed and done reverence thereto; and in having placed, or caused to be placed, in the said Church, a modelled figure of the Infant Saviour, with two Lilies on either side, and a figure or stuffed skin of a Dove; and in having, on Good Friday, caused or permitted the Holy Table, during Divine Service, to be and remain without any covering; and in having made the sign of the Cross on divers occasions; and in having caused or sanctioned a Clergyman to kiss the Book from which he read the Gospel; and in having stood with your back to the people in the middle of the Holy Table, whilst reading the Prayer for the Church Militant; and in having, while reading the word "Oblations," taken up the *Chalice* and elevated it above your head; and in having read the Collects in the Communion Service, and directed or sanctioned the reading by other Clergymen of the Collects and Epistle in the Communion Service standing in the front of the middle of the Holy Table, with the back to the people; and in having publicly given notice that there would be a High celebration of the Holy Eucharist, and that on certain days, being the Feasts of *St. Leonard*, *St. Martin*, and *St. Britius*, there would

be a celebration. And, further, to abstain from the use of, or sanctioning the use of, the following rites, ceremonies, acts, observances, matters, and things, in which the said Judicial Committee did also report to Us that you had offended, to wit, in having yourself used and worn a Vestment, called a *Chasuble*, while officiating in the Communion Service and in the administration of the Holy Communion; and in having sanctioned and authorized, whilst present and responsible for the due performance of Divine Service, the wearing of a *Chasuble* by other Clergymen, whilst officiating in the Communion Service and in the administration of the Holy Communion; and in having yourself worn, when officiating in the Communion Service, a Vestment called an *Alb*, and in having caused or suffered other Clergy, officiating or assisting at the Communion Service in your presence, to wear certain Vestments, called *Tunics*, *Tunicles*, and *Albs;* and in having administered Wine mixed with Water, instead of Wine, to the Communicants at the Lord's Supper; and in having used in the administration of the Holy Communion wafer-bread, instead of Bread such as is usual to be eaten; and in having stood with your back to the people, between the people and the Holy Table, whilst reading the Prayer of Consecration in the Holy Communion; as by the Order next hereinafter mentioned, reciting and approving of the said Report, is in that behalf expressed.

"And whereas on the 16th day of May, 1871, We were pleased, by and with the advice of Our Privy Council, to approve of the said Report, and of what was therein recommended, and to order that the same be duly and punctually observed, complied with, and carried into execution (justice so requiring). We do, therefore, command you, the said *John Purchas*, to abstain for the future from the use of, or sanctioning the use of, the said rites, ceremonies, acts, observances, matters, or things, or any of them; and hereof fail not.

"Given at London, under the Seal which We use in this behalf, the 22nd day of June, in the Year of our Lord, 1871."

The Order in Council of the 23rd of February, 1871, having condemned the Respondent in all the costs incurred in the cause, as well in the Court below as on appeal, and the same having

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been taxed at the sum of £2,096. 14*s.* 10*d.*, a Monition, dated the 20th of September, 1871, for the payment of that sum was duly issued and served on the Respondent.

Notwithstanding the Order in Council and the Monitions issued thereon the Respondent persisted in the practices and ceremonies condemned, and against which he had been monished and enjoined, and conducted the services in his Church as before, whereupon an application was made to the Judicial Committee, and the following Order obtained, suspending the Respondent for the space of one year from the discharge and execution of all the functions of his Clerical office; and directing a Sequestration for the amount due from him for costs, and for which he had already been monished.

J. C.* 1872 *Feb.* 7.

This Order of Suspension, which was made on the 7th of February, 1872, on a motion to enforce the Monitions, specified the acts done by the Respondent in contempt and contravention of the former Order and Monition, and was in these terms:—

"The Lords of the Committee having read the affidavit of *Ebenezer Wells*, and also the affidavits of *George Thomas Glenan*, and *Henry Miller*, heretofore filed in this appeal, and having heard Counsel on behalf of *Henry Hebbert*, the substituted Promoter of the office of the Judge in the said appeal, pronounced that the Respondent, the Rev. *John Purchas*, had disobeyed the Monition dated the 22nd day of June, 1871, and which had been duly served upon him, whereby he was commanded to abstain for the future from the use of, or sanctioning the use of, the rites, ceremonies, acts, observances, matters, or things, or any of them, which are set forth in the said Monition, and more especially, that he had disobeyed the said Monition in regard to the following matters, that is to say: in having in the said Church or Chapel of *Saint James*, at *Brighton*, since the said Monition was served upon him, used and worn, and authorized to be worn, a certain Vestment called a *Cope*, at other services than that of the Communion Service, and in having used and worn a Tippet, of a circular form, and a Vestment described as a *Maniple*, and in having used and

* *Present*:—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK (DR. THOMSON), THE BISHOP OF LONDON (DR. JACKSON), SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

worn, and authorized to be worn, Vestments, described as *Albs*, with *Patches*, called Apparels, and in having caused himself to be censed when at the Communion Table, and in having caused a small Bell to be rung divers times during the service of the Holy Communion, and in having caused to be said or sung before the reception of the Elements in the said service, a Hymn or prayer, commonly known as 'The *Agnus*,' which said Hymn or prayer is appointed to be said at the conclusion of the said service, and in having censed, or permitted to be censed, a Crucifix placed on the Holy Table during Divine Service, and having used, or permitted to be used, incense, for censing persons and things, and in having mixed in and during the Communion Service, and as part of the ceremonial thereof, Water, with the Sacramental Wine; and permitted and sanctioned such mixing; and in having elevated the *Paten* and Cup above his head, and prostrated himself, or knelt, during the Prayer of Consecration; and in having used lighted Candles when not wanted for the purpose of giving light; and in having placed, or caused to be placed, on the Holy Table, a Crucifix, and in having made the sign of the Cross upon divers occasions; and in having caused or sanctioned a Clergyman to kiss the Book from which he read the Gospel; and in having stood with his back to the people in the middle of the Holy Table whilst reading the prayer for the Church militant; and in having, while reading the word 'oblations,' taken up the *chalice*, and elevated it above his head; and in having himself used and worn a Vestment called a *Chasuble*, while officiating in the Communion Service; and in the administration of the Holy Communion; and in having administered Wine mixed with Water, instead of Wine, to the communicants at the Lord's Supper; and in having used in the Administration of the Holy Communion Wafer Bread instead of Bread such as is usual to be eaten; and in having stood with his back to the people, between the people and the Holy Table, whilst reading the prayer of Consecration in the Holy Communion. And their Lordships ordered, that for such his disobedience, he, the said Rev. *John Purchas*, be suspended for the space of one year from the time of the publication of the Decree of Suspension, to be issued in that behalf, from the discharge and execution of all the functions of his clerical office; that is to say,

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from preaching the Word of God and administering the Sacraments, and performing all the other duties of such his Clerical office: and their Lordships did direct that a Decree of Suspension be issued suspending him accordingly; and that the same be published on Sunday the 18th day of February instant, previously to the commencement of Divine Service, by affixing the same for some time on the principal door of the said Church or Chapel; and by affixing and leaving thereon affixed a true copy thereof, and also by personally serving the said decree upon him the said Rev. *John Purchas.*

"Their Lordships did further pronounce the said Rev. *John Purchas* to be contumacious and in contempt, in not having obeyed the Monition, dated the 20th day of September, 1871, which had been duly served upon him, for payment of the sum of £2,096. 14*s.* 10*d.*, found due from him for costs; and for such his manifest contumacy and contempt their Lordships decreed process of Sequestration against all the real and personal estate and effects of him the said Rev. *John Purchas;* but their Lordships directed that previously to the issuing of such process of Sequestration a further affidavit as to the non-payment of the said costs be filed by the Proctors for the said *Henry Hebbert.*

"Their Lordships further directed that a notification of such the suspension of the said Rev. *John Purchas* be duly given to the Lord Bishop of *Chichester.*"

In accordance with such Order, an instrument of Suspension was issued on the 16th of February, 1872, and was duly published on Sunday, the 18th of February, 1872, by affixing the same under seal for some time on the principal Door of the Church or Chapel of *Saint James, Brighton,* previously to the commencement of Divine Service, on the morning of that day, and by leaving thereon affixed a copy thereof, and also by shewing the instrument under seal to the Rev. *John Purchas,* and by leaving with him a copy thereof.

Notification of the Suspension was given to the Bishop of the Diocese as directed by their Lordships' Order.

It appeared from the affidavits filed, that the Rev. *John Purchas* had, since the publication and service on him of the Sentence of Suspension, namely, on Sunday, the 25th of February, 1872, and on

Sunday, the 14th of April, 1872, been guilty of further contempts of Court, by officiating as Minister in the Church or Chapel of *Saint James, Brighton.* And it appeared, from the affidavit of *Charles Ebenezer Verrall,* that the Rev. *John Purchas,* after concluding his Sermon at the Evening Service on the said 25th of February, 1872, delivered an address to the Congregation, in which he stated that, notwithstanding the Sentence of Suspension, he should continue to officiate in the Chapel, and to observe the practices prohibited by the Monition. It also appeared by the Affidavits, that the Rev. *John Purchas* was, on the said 25th of February, 1872, and also on the 14th of April, 1872, guilty of further contempt of Court by himself observing or permitting several of the practices prohibited by the Monition, and for the continued observance of some of which the Sentence of Suspension was pronounced.

The Chapel of *Saint James, Brighton,* was, by a private Act of Parliament passed in 1826, appropriated as a Chapel of Ease to the Parish Church of *Brighton.* By sect. 2 of the Act it was directed, that the Chapel should be consecrated (which was afterwards done), and that Divine Service should for ever afterwards be performed therein, according to the rites and ceremonies of the Church of *England,* by Perpetual Curates to be nominated as thereinafter directed, and that the Chapel and the Perpetual Curates thereof should be subject to the ordinary jurisdiction and visitation of the Bishop of the Diocese. At the time of the passing of the Act, *Nathaniel Kemp,* Esq., was proprietor in fee of the Chapel, and the right of nominating to the Perpetual Curacy thereof was, by the Act, vested in him, his heirs and assigns, for forty years, and after the expiration of that term in the Vicar of *Brighton* and his successors. By sect. 7 one Pew in the Chapel was directed to be set apart for the use of the Curate, and certain other Pews set apart and appropriated for the benefit of the Curate for the time being of the Chapel, in order to secure to him out of the rents of the same an income of £150 per annum. By sect. 9 the rents and profits of the remaining seats were vested in *Nathaniel Kemp,* his heirs and assigns. It further appeared that the Rev. *John Purchas* had obtained by purchase the proprietary rights of *Nathaniel Kemp* in the Chapel,

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and the right of nominating and presenting a Perpetual Curate to the Chapel on the next vacancy belonged to the Vicar of *Brighton*, by reason of the forty years during which the nomination and presentation was vested in *Nathaniel Kemp* and his assigns having expired.

In consequence of the Respondent having been guilty of the aforesaid contempts of Court, it became necessary to apply to the Judicial Committee of the Privy Council for a further Order in the matter.

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A motion was made, after due notice to the Respondent, who declined, as heretofore, to appear either in person or by Counsel, that a sentence of deprivation of the Respondent of the Perpetual Curacy of the Church or Chapel of Saint *James*, *Brighton*, and of his Ecclesiastical promotion therein, might be decreed against him for his continued contumacy and contempt, or for such other order as to their Lordships should seem meet to make, to enforce the due observance of the Orders and Monitions of the Court.

Dr. *Tristram* appeared for the Appellant in support of the application, and contended that the Judicial Committee being by the Acts, 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, the substituted Tribunal for the Court of Delegates, had by those Acts, and also by the 6 & 7 Vict. c. 38, s. 2, the same powers for enforcing their Orders and decrees as belonged to the Court of Delegates, and could make an Order of deprivation.

LORD CHELMSFORD :—

Their Lordships desire to receive further information as to the exercise of the power on the part of the Court of Delegates or of this Tribunal to deprive a Clerk on a summary application against him for contempt. The application before their Lordships is not made in a suit for the Ecclesiastical offence of officiating during the time of suspension; it is a motion to punish a contempt of Court in a particular manner by Sentence of depriva-

* *Present*:—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK (DR. THOMSON), LORD CHELMSFORD, THE BISHOP OF LONDON (DR. JACKSON), SIR JAMES WILLIAM COLVILE, and SIR MONTAGUE EDWARD SMITH.

tion without a suit. Their Lordships do not doubt that they possess means to enforce their Orders and Decrees, and these remarks apply to that part of the motion now before them which asks for a Sentence of deprivation: but they wish for further information regarding the exercise of such a power by the Court of Delegates, and desire that the motion may stand over for that purpose.

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In consequence of this intimation the application stood over, and now came again on for hearing.

Mr. *A. J. Stephens*, Q.C., Dr. *Tristram*, Mr. *Archibald*, and Mr. *B. Shaw*, for the Appellant:—

It is clear from the affidavits that have been filed that Mr. *Purchas* has been and is still acting in gross contempt of the Orders and Monitions of this Court pronounced against his officiating in his Church or Chapel of St. *James's* at *Brighton*, and that he continues the same objectionable practices and ceremonies that have been declared absolutely illegal by this Tribunal, and against the use of which he has been prohibited and enjoined by the Orders and Monitions of this Court. [THE LORD CHANCELLOR:—There is no doubt as to the contempt.] Such gross contempt and contumacy as this no Court of Justice can allow, and your Lordships are not only armed with powers sufficient to vindicate your authority by the Act which created this Court, the 3 & 4 Will. 4, c. 41, s. 28, but have all the powers under the 2 & 3 Will. 4, c. 92, which were possessed by the High Court of Delegates to punish contempts as well as to enforce your Orders and decrees. We admit that, after a most careful search we have not been able to find a case in which the Court of Delegates decreed a sentence of deprivation for a contempt of its decrees or Sentences, but we apprehend that they possessed the power, and in a case so gross as this would not have hesitated to exercise it. Nevertheless we are willing for the present to waive our application for a Sentence of deprivation, and to ask your Lordships for a further Sentence of suspension with the accumulative punishment of making such suspension, *ab officio et à beneficio*. There is abundant authority in the records of the High Court of Delegates, and under the *Church Discipline Act*, 3 & 4 Vict. c. 86, for such a

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Sentence of suspension: *Jones* v. *The Bishop of Bangor* (1); *Boughton* v. *Dean of York* (2); *Harrison* v. *The Archbishop of Dublin* (3); *Higgins* v. *The Archbishop of Dublin* (4); *Morris* v. *Ogden* (5); *Bunter* v. *Cresswell* (6); *Pinder* v. *Barr* (7); and, we submit, that nothing short of such a deprivation will meet the justice of the case, or sufficiently vindicate the authority of this Court.

The Respondent did not appear.

THE LORD CHANCELLOR:—

The researches made by the learned Counsel, as to whether or not there is any precedent for the removal of a Clerk from his Benefice, in a summary manner, by way of punishment for contempt, have resulted in no such precedent being found, as indeed their Lordships supposed would probably be the case; and without pausing to inquire, whether by any substantive proceeding founded on the Ecclesiastical offence of disobedience to the Order in Council that has already been pronounced, a Sentence of deprivation or a motion might have been maintained, we are of opinion, that we cannot proceed to enforce compliance with the Order which has been disobeyed by any summary process for contempt, through the medium of a motion. On the other hand, their Lordships are quite satisfied that there exists in this Tribunal, as there did exist in the High Court of Delegates—all the powers of which have been transferred to this Committee—a power of suspension not only *ab officio*, but *à beneficio* also, as a summary punishment for contumacy; and their Lordships have arrived at the conclusion that it is right and proper in a case like the present, where the contumacy is persistent, to direct and order that the Respondent be suspended *ab officio et à beneficio* from his Chapel of *Saint James, Brighton*, for the space of one year from the present time.

Proctors for the Appellant: *Moore & Currey.*

(1) Parliamentary Papers, 199, 3rd April, 1868. Return of appeals to the High Court of Delegates, No. 63.
(2) Ibid. No. 134.
(3) Ibid. No. 135; S.C. 2 Bro. P.C. 199.
(4) Ibid. No. 136.
(5) Law Rep. 4 C. P. 687.
(6) 14 Q. B. 825, 828.
(7) 4 E. & B. 105, 114.

CHARLES MILLER ALDRIDGE . . . . APPELLANT;

AND

GEORGE CHRISTOPHER CATO . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

Natal, Law of—Ordinance, No. 4 of 1849—Partnership—Joint stock Company—Quasi Corporation—Limited liability—Winding-up Ordinance, No. 19 of 1866—Practice—Appealable value.

In a suit brought by the Official Manager of a partnership and Joint-stock Company, appointed under the *Natal* Winding-up Ordinance, No. 19 of 1866, against a registered Shareholder, for an instalment on a call made by Order of the Supreme Court, the Defendant pleaded, Ordinance No. 4 of 1849, of the Colony, under the provisions of which he alleged the Company was incorporated, and that having paid his shares in full, he was not liable for any debts due or incurred by the Company. The Supreme Court of *Natal* held, upon the construction of the Deed of agreement constituting the Company, and the Ordinance, No. 4 of 1849, enabling the Company to carry the same into effect, that such Ordinance did not incorporate the Company so as to exempt the Shareholders from individual liability in respect of the debts of the Company, but only conferred on them facilities for carrying on the business of the Company, and the objects of the original Deed whereby it was constituted. Such construction and decision confirmed, on appeal, by the Judicial Committee.

It is too late for the Respondent at the hearing to take an objection to the competency of the appeal, on the ground that the subject-matter of the suit did not involve the prescribed appealable value; such objection not having been taken in the Respondent's case. The proper course would have been for the Respondent to move, in the first instance, to dismiss the appeal on that ground.

THIS suit was brought by the Respondent, in his capacity of Official Manager of the *Natal Fire Assurance and Trust Company*, under the *Natal* Winding-up Ordinance, No. 19 of 1866, against the Appellant, a Shareholder in the Company, for the payment of an instalment of calls to be due by the Appellant upon forty-eight shares in that Company, of which he was the registered Owner.

* *Present:*—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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The case was a representative one as between the fully paid-up Shareholders and the Creditors of the Company, then being wound up in the Colony of *Natal*, under the provisions of the Ordinance No. 19, 1866, "to facilitate the winding-up of Joint-stock Companies."

According to the Official Manager's Report, the Company's assets were estimated at £43,731. 13*s.* 1*d.*, and the Creditors' debts amounted to £47,700. 17*s.* 3*d.*, leaving a deficiency of assets as compared with liabilities to Creditors of about £4,000, exclusive of costs incurred in the winding-up. The assets were not capable of immediate realization. The call was made with a view to provide for the liabilities of the Company, and the result of the appeal was to determine, whether or not the fully paid-up Shareholders were liable to make good the deficiency of assets as compared with the liabilities of the Company, whatever that deficiency might be.

The facts of the case were as follows:—

The *Natal Fire Assurance and Trust Company* was constituted by a Deed of agreement, dated the 1st of May, 1849, as a Joint-stock Company or co-partnership, having a capital stock, consisting of the sum of £10,000, divided into 500 shares of £20 each, with a provision for an increase of the capital.

The Deed of agreement contained provisions for the transfer of shares and vesting the management of the Company in Directors, and declared the purposes of the Company to be the insurance of moveable and immoveable property of every description (save as thereinafter mentioned) against loss or damage by fire, the administration and management of such estates and other property as the Company should be duly appointed to administer and manage as Executors, Tutors, Guardians, Curators, Administrators, Trustees, Assignees, or Agents, either under and by virtue of a decree of any competent Court of the Colony, or by the last Will and Testament, or valid writing, act, or Deed of any person or persons, or by virtue of any marriage settlement, Power of Attorney, or otherwise.

By the 29th article of the Deed it was provided, that every Policy of Assurance entered into or granted by the Directors under any of the provisions of that Deed, should clearly express

by way of condition, that the capital stock and funds of the Company should alone be liable, to answer and satisfy any claim or demand which might be made upon the Company under and by virtue of such Policy, and that no Shareholder of the Company, his Heirs, Executors, Administrators, or Assigns, should be in anywise chargeable or liable in respect of any such claim or demand as aforesaid, beyond the amount of his share or shares in the capital stock of the Company.

Article 33 of the Deed provided, that every claim duly made upon the Company was to be adjusted, and (if found correct) paid and satisfied or otherwise settled by the Directors, within a period of four calendar months from the day on which such claim should have been notified to them.

By article 39 of the Deed, the Directors were authorized and empowered, at any time when they should see fit so to do, to apply to the Governor and the Legislative Council of the Colony, and to obtain from them, at the costs and charges of the Company, an Ordinance for the incorporation thereof, and for enabling the Company to sue and be sued in the name of their Secretary for the time being, and for the more effectually legalising and carrying into effect the objects and purposes of the Company.

In accordance with this Deed of agreement, and the provisions therein, Ordinance No. 4, of 1849, intituled "An Ordinance for enabling the Board of Directors of the '*Natal Fire Assurance and Trust Company*' to sue and be sued in the name of their Secretary, was duly enacted by the Government of the District of *Natal;* which after reciting that certain persons therein named did, by the Deed of the 1st of May, 1849, enter into a contract of co-partnership for the purposes aforesaid, and reciting that those persons had raised among themselves a joint-stock or capital of £10,000 sterling, in 500 shares of £20 sterling each, to serve as an available fund to satisfy any claim or demand which any person might thereafter have upon the said co-partnership, and reciting that those persons had applied for an Ordinance to incorporate the said co-partnership and Joint-stock Company, and in order the better to enable them to carry the said objects into effect, and reciting that the interests of the District would be thereby greatly promoted, enacted, by section 1, that it should

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and might be lawful for the persons who had executed the said Deed, and such others as might become entitled to the privilege of that Ordinance, under and by virtue of the provisions of the said Deed, to be and continue joint-stock proprietors of the said sum of £10,000, and of such sums as they might thereafter acquire under the provisions of the said Deed, and to constitute and be a Company for the purposes before mentioned to be carried on under the style or firm of "The *Natal Fire Assurance and Trust Company*."

And by sect. 7 it was enacted, that all appointments under or by virtue of any last Will and Testament, Codicil, or of any Deed or Act which should have been at any time previous to the passing of that Ordinance, or which should thereafter be duly made and executed of the Directors of the *Natal Fire Assurance and Trust Company*, or of the Secretary of the said Company, as Executors, Administrators, Tutors, Curators, or Agents, or as Executor, Administrator, Tutor, Curator, or Agent, as the case might be, should be deemed and taken to be a valid appointment of the *Natal Fire Assurance and Trust Company*, thereby constituted.

The Ordinance then specially provided (sects. 9, 10, 11) for actions being brought and defended by the Secretary.

And sect. 12 further enacted, that no claim or demand, which any Member of the said *Natal Fire Assurance and Trust Company* might have in respect of his share of the capital stock of the said copartnership, or of any dividends, interest, or profits payable in respect of such share, should be capable of being set off, and that no claim in reconvention should be brought on account of any such share, or dividends, or profits, against any demands which the said *Natal Fire Assurance and Trust Company* might have against such Member, on account of any other matter or thing whatsoever, but that all proceedings in respect of such other matter or thing, might be carried on as if no claim or demand existed in respect of such capital stock, or of any dividends, interest, or profits payable in respect thereof.

And by sect. 13 it was declared that two Directors might execute Bonds, &c.

Sect. 14 enacted, that the *Natal Fire Assurance and Trust Company* should continue and be in force until the 11th of April, 1870, and that from and after the 11th of April, 1870, that Company

should not enter upon the administration of any property or estate, or insurance of any property; provided, however, that the Company should be authorized to continue the administration of any property or estate upon which they should have previously entered, so as without delay to bring the same to a final settlement, as also to liquidate and adjust all such insurances as might have been effected with the Company up to the date of the 11th of April, 1870, for which purposes only the Company should thenceforth continue under or by virtue of the provisions of that Ordinance.

Sects. 15 and 16 declared the Ordinance to be a public Ordinance, to take effect from its promulgation.

On the 28th of January, 1862, 1,000 new shares of £20 each, amounting to £20,000, were created in the Company.

It appeared from the evidence that the Appellant was a Surgeon resident at *Pietermaritzburg*, in the Colony, and acquired by transfer to him, from time to time, in the years 1862, 1863, and 1864, thirteen original shares and thirty-five new shares, making a total of forty-eight shares in the Company.

The full sum of £20 was duly paid on each of the shares before the commencement of the winding-up proceedings, and the shares were fully paid up.

On the 30th of January, 1867, the Respondent, as a contributory of the Company, presented to the Chief Justice and Judges of the Supreme Court of the Colony a petition in the matter of the Winding-up Law of 1866, and in the matter of the said Company, whereby after stating (among other things) that more than three-fourths of the paid-up Capital of the Company had become unavailable, he prayed, as a Shareholder of at least fourteen shares in the Company, and as such a contributory, that the Company might be wound up for the general benefit of the Creditors.

On the 5th of March, 1867, the Supreme Court ordered that the Company should be wound up for the benefit of its Creditors, and the Respondent was appointed the Official Manager of the Company in the matter of its winding-up.

The Official Manager by his Reports, dated severally the 30th of March and the 1st of May, 1867, stated and set forth the liabilities and assets of the Company, from which it appeared that about

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£4,000 was due to the Creditors of the Company, to meet which he recommended that a call of £10 per share should be made upon the several registered Shareholders of the Company, which was accordingly ordered by the Supreme Court on the 1st of May, 1867; and no cause having been shewn against such Order, a call of £2. 10*s*., being the first instalment of a call of £10 per share, was made on the Appellant in respect of his forty-eight shares. The Appellant having refused to pay this call, the proceedings out of which this appeal arose were taken against him.

The summons in the suit, in which the judgment under appeal was obtained, was for the recovery of £120, the amount of the £2. 10*s*. per share call on the forty-eight shares, the first instalment being payable on the 1st of September, 1867.

The declaration alleged to the effect hereinbefore stated, and also that by the provisions of the Ordinance No. 19, of 1866, entitled "a Law to facilitate the Winding-up of Joint-Stock Companies," the Shareholders of the above Company were bound to contribute to the payment of the debts, liabilities of, and costs, charges, and expenses of the winding up the Company.

The Defendant (the Appellant) by his plea, after stating the effect of the Deed and Ordinance of Incorporation of the Company, No. 4 of 1866, admitted that he was a Shareholder of forty-eight shares in the Company, upon each of which £20 sterling had been paid up, and averred that he was not legally liable under the same Ordinance of Incorporation or the Deed of agreement to pay or contribute any further sum to the Company, and that he was not individually responsible or liable for any debt due or liabilities incurred by the Company.

The suit was heard before the Chief Justice (*Walter Harding*, Esq.), and the Justices *Phillips* and *Cope*, and on the 28th of July, 1868, judgment was pronounced in favour of the Respondent, Mr. Justice *Phillips* dissenting.

The appeal was from this judgment.

The *Solicitor-General* (Sir *George Jessel*, Q.C.), for the Respondent:—

On the opening of the appeal took a preliminary objection to the hearing of the appeal, as the amount at issue in the suit was

not sufficient to bring it within the rule applicable to the appellate value of £500 as prescribed for appeals from the Colony of *Natal;* no special leave to appeal having been granted by the Judicial Committee.

THE LORD JUSTICE JAMES :—It does not appear from the Respondent's case that he intended to rely on such a technical point as this. The Appellant has had no notice that such an objection would be raised at the eleventh hour. The proper course would have been to have moved to dismiss the appeal before any steps were taken or expense incurred to bring it to a hearing. Is it worth while to press the objection ?

The *Solicitor-General* assented, and waived the objection.

Sir *John Karslake,* Q.C., and Mr. *A. G. Marten,* for the Appellant :—

By the *Natal* Legislative Ordinance, No. 4 of 1849, the *Natal Fire Assurance and Trust Company* was incorporated, and as an incident of such incorporation the liability of the members in respect of the engagements of the Company was limited to the amount of their shares. The Appellant having paid up his shares was, therefore, not liable for calls under the Winding-up Ordinance of the Colony, No. 19, of 1866. Express words are not necessary to constitute a corporation, if the intention of the Legislature is clear. By the Roman-Dutch Law the Members of a *universitas,* or public corporate Company, are not individually liable for the debts of the Company ; the corporate funds are alone liable : *Voet.,* Lib. III., tit. 4, sects. 1, 2, 3. The *Colonial Limited Liability Ordinance,* No. 4 of 1864, was not in existence at the date of the Act of Incorporation of the Company, but that Act itself operated to the same effect as regarded the liability of the Shareholders. Where the construction of an Act is doubtful, the purpose intended by the parties is the guide : *The Eastern Archipelago Company* v. *Reg.* (1). Here no advantage would be obtained unless the Company were incorporated. This was an incorporation by Statute, which differs from one by Charter, and can only be annulled or set

(1) 18 Jur. 481. 2 El. & Bl. 94.

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aside by a Statute: *Grant* on Corporations, p. 39–295. In *Evans* v. *Coventry* (1) the Company was not a chartered Company, but one existing only by contract. If the Company be a Corporation, as we contend it is, by the *Natal* Ordinance, the liability of the Members in respect of the engagements of the Company was limited to the amount of their shares; and those held by the Appellant, in respect of which the call in question was made, were fully paid up before the making of the call. He could, therefore, in no sense be liable for contribution, and ought not to have been held so. The judgment of the Supreme Court was erroneous, and ought to be reversed.

The *Solicitor-General* (Sir *George Jessel,* Q.C.), Mr. *Cracknall,* and Mr. *J. D. Wood,* for the Respondent:—

The Ordinance, No. 4 of 1849, was not such an incorporation of the *Natal Fire Assurance and Trust Company* as constituted them a body corporate. It was, as its title expressed, simply an Ordinance for enabling the Directors to sue and be sued in the name of their Secretary. It neither created, nor proposed to create, a Corporation, and is only so termed in the marginal note, which is no part of the Ordinance, an Ordinance of Incorporation. The title of an Act is not part of the Act: *Shaw* v. *Ruddin* (2). All the provisions contained in it shew that the sole intent of the Colonial Legislature was to enable the Company to carry out the objects of the Deed of agreement, and, though a partnership, to sue or be sued by their Officer. The Roman-Dutch Law is not applicable to the case, but if it were, there is no pretence for calling the Company a *universitas,* or claiming for it the rights and privileges of such a corporate or public body: *Voet, Pand. Lib.* 47, tit. 22; as to Corporations, *Ib. Lib.* III. tit. 4, s. 1. By the English Law, which must be the rule of interpretation of this Ordinance, in order to create a Corporation there must be words of incorporation: 1 *Bl.* Com. pp. 471-3. Even if the Company was incorporated with a limited liability, such limited liability applied only to the trading authorized by the Ordinance; but the borrowing money on fixed deposits, the discounting Promissory notes, the advancing money to individuals on landed security, the guaranteeing debts of third parties, which were

(1) 2 Jur. (N.S.) 557. (2) 9 Ir. C. L. Rep. 214.

all proved to have been practised by the Company, even if within the scope and authority of the 10th section of the Deed of agreement, so as to render the Shareholders not personally liable, was *ultrà vires* the power conferred by the Ordinance, and was known to be so by the Appellant, as well as the other Shareholders who profited by such trading transactions: *Gregory* v. *Patchett* (1), *Balfour* v. *Ernest* (2). Neither the Ordinance nor the Deed of agreement constituted this more than a Joint-stock Company, the provisions of the Deed did not effect, if they could have intended to make it, one of limited liability. No Colonial Ordinance for limited liability existed in 1849, the date of the Deed of Agreement, or before 1864, when the first No. 10 of that year was passed.

THE LORD JUSTICE JAMES:—

Their Lordships are of opinion, that the decree of the Supreme Court of the Colony of *Natal* in this case ought to be affirmed.

When the Deed which constituted the Company now being wound up in that Colony comes to be looked at, it is obvious that it was a Company for very large transactions in business of a varied kind, including liabilities arising from the receipt of trust moneys, from the Administration of Executorships, general Agencies, the receipt of Book debts, rents, repairs, and various other matters (all of which are mentioned in the schedule to the Deed, specifying the charges they are to make), evidently pointing to the receipt of very large funds; [in dealing with which the Directors were to be authorized to lay them out on mortgages, immoveable property, Bonds, Bills of exchange, Promissory notes, capital stock, Government debentures, and other securities, under colour of which they did the business of Bill Discounters. It is obvious that the business was a business which nobody would trust to them if their liability was limited to such a sum as £10,000, or any such sum as that mentioned as the capital of the Company. When we come to look at the Deed, it does not contemplate any limited liability, but leaves the Shareholders liable in everything, like an ordinary partnership, except in one particular case, which

(1) 10 Jur. (N.S.) p. 1128. 33 Beav 595.

(2) 5 Jur. (N. S.) 439. 5 C.B.N.S. 601

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exception proves the general rule. That particular case is the case of Policies of Insurance, as to which they expressly limit their liability to the amount of their capital stock. We start, therefore, with this, that there was a trust Deed which left them an ordinary Joint stock partnership, with liability of course for payment to their just creditors.

Then there came an application to the Legislature of *Natal* for an Ordinance which is said to have altered that state of things, and to have given them a corporate character, and as the result a liability limited to the amount of their shares. It would be very strange if the Legislature of *Natal* had intended to have done that, if they had intended to have made these Gentlemen liable only to the amount of their small capital in respect of the unlimited transactions into which they were about to enter. In truth, the Ordinance itself does not in terms profess to incorporate them, it does not profess to relieve them from any liability; it gives them none of the ordinary powers, nor does it make any of the ordinary provisions which are provided in respect of a Corporation. It enables them to sue and be sued as a *quasi* corporate body, in the name of the Secretary. The title so describes the Ordinance, and their Lordships were referred to some modern cases to shew that the title may under some circumstances be looked at. Their Lordships are not disposed to consider that question here.

On the other hand, their Lordships have been properly referred to the preamble for the purpose of seeing what the objects of the Legislature were. The preamble no doubt says, "Whereas the said persons have applied for an Ordinance to incorporate the said co-partnership and Joint-stock Company, and in order the better to enable them to carry the said objects into effect," that is to say, the insurance of property and so on, and the administering and managing as Executors, Tutors, Guardians, Curators, Administrators, Trustees, Assignees, and so on. And then it recites, that the interests of the District would be thereby greatly promoted, that is to say, it would be promoted by the better enabling them to carry their several objects into effect. That was the substance of the recital. When their Lordships look at the Ordinance itself, it seems to them utterly inconsistent with the idea that any incorporation in the ordinary sense of the word was

intended to be effected. The first thing that is done is to provide "that it shall and may be lawful for the said persons who have executed the said Deed, and such others as may become entitled to the privilege of the Ordinance now in statement, under and by virtue of the provisions of the said Deed, to be and continue joint stock proprietors of the said sum of £10,000, and of such sums as they may hereafter acquire under the provisions of the said Deed, and to constitute and be a Company for the purposes before mentioned, to be carried on under the style or firm of "*The Natal Fire Assurance and Trust Company.*" It then provides, "that a copy of the Deed executed by the said persons duly authenticated by the secretary of the said *Natal Fire Assurance and Trust Company*, appointed under the provisions of the said Deed, shall be filed in the office of the Registrar of the District Court of the said District within one month of the Ordinance now in statement, and in like manner a return of the names of the several persons at the time being members of the said *Natal Fire Assurance and Trust Company*, with their respective places of abode, and the name and place of abode of the Chairman and of each Director thereof, and of the Secretary thereof, in the same manner authenticated, shall be at the same time filed in the said office. That a copy of all alterations in or additions to the said Deed, which may at any time be made in conformity with the provisions therein contained, shall within one month after any such alterations or additions shall have been duly made in like manner authenticated, shall be in like manner filed in the office of the said Registrar." The plain meaning of these provisions is, that they were to continue to exist as a Company or co-partnership under a Deed, which would be perfectly inconsistent with their being made into a Corporation, existing under legislative enactment. The two things could not co-exist. They could not be a Joint-stock Company or co-partnership continuing to exist under a Deed, and according to the constitution of that Deed, and at the same time a Corporation created with a totally distinct nature for the first time called into existence by the Ordinance of the *Natal* Legislature. Of course the Ordinance might have incorporated the Deed, as part of the Charter of incorporation, or as bye-laws of the Corporation, but nothing of the kind was said or intended. The first provisions,

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therefore, shew that it was not intended in any way to destroy the co-partnership, which would be destroyed if the co-partnership were converted into a body corporate and politic. All the other provisions are provisions which are entirely consistent with the constitution of a Joint-stock Company, and are utterly inconsistent with a Corporation. It is to sue and be sued, not in a corporate name, but in the name of the Secretary. The Secretary is to defend, not for a Corporation, but for the Company and for the members thereof. The *Natal Fire Assurance and Trust Company*, is in one section talked of as a plural body, the expression being "and not against the *Natal Fire Assurance and Trust Company*, or any of them, or against the members or any of them." There are provisions as to suits by or against members of the Company, which would be useless if the Company had really been made a body politic and corporate. Then there is the 13th clause, to which the attention of their Lordships has been called, and that is, "That any two Directors of the Company may execute any Bond or other act on behalf of the Company, and may draw up or execute any inventory or liquidation, distribution, or other account, and all such bonds, &c., so executed shall be equally valid as if the same had been done and executed by every one of the members thereof." That points to the existence of a partnership, and that the Partners were all of them to be bound by the acts and deeds of the Directors, as their own personal acts and deeds. It would be perfectly inconsistent with the idea that there was to be a Corporation, merely with the liability of that Corporation in its corporate capacity, with respect to corporate funds. This is in truth quite consistent with a very rational meaning of the recital. The Company ask to be incorporated the better to enable them to carry their objects into effect, and the Legislature is willing to give them so many of the characteristics of a Corporation as are convenient for that purpose and none other.

Their Lordships are clearly of opinion, that the judgment of the Supreme Court was right, in holding that this was a Company properly wound up, and that the call made on the Shareholders, was a proper call to be made in the winding-up and discharge of the liabilities of the Company. They will, therefore, humbly

recommend to Her Majesty that the appeal be dismissed, with the usual consequences, with costs. It is said that this is a representative case. The other persons in the same position as the Appellant may probably think it right to subscribe to pay their *quota* of the costs, but the Respondent, on behalf of the estate and for himself, is entitled to have his costs paid in the usual manner.

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Solicitors for the Appellant: *Thomas & Hollams.*
Solicitors for the Respondent: *Kimber & Ellis.*

Applied. BATTLE *v.* ATT.-GEN. [1949] P. 358

THOMAS PHILIPPE LA CLOCHE . . . . APPELLANT;

AND

THOMAS LA CLOCHE . . . . . RESPONDENT.

AND, BY REVIVOR,

THOMAS PHILIPPE LA CLOCHE . . . . APPELLANT;

AND

THE VISCOUNT OF JERSEY . . . . . RESPONDENT.

J. C.* 1872 *June* 27, 28.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Jersey, Law and Customs of—Authority of Text Writers on Norman Law—Legitimation per subsequens matrimonium — Evidence—Succession—Deed of gift inter vivos, disinheriting sole heir—Practice—Abatement of appeal—Vacant Succession—Revivor against the Viscount of the Island.

The written customary Laws of *Normandy* since the time of the separation of the Island of *Jersey* from that Duchy are authorities received in *Jersey* as expositions of the Law and customs of the Island.

According to the Law of *Jersey*, an illegitimate child is legitimated *per subsequens matrimonium.*

A domiciled Jerseyman was the putative Father of a child by a Jerseywoman. He afterwards married in *England* the Mother of the child:—*Held*, that proof of the certificate of the marriage, coupled with the fact of the child being always acknowledged by him, and received as the offspring of the Husband and Wife, was sufficient evidence, without any formal recognition of paternity by the Father.

A gratuitous gift by Deed of real estate to a Grandson by his Grandfather

* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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to the disinheritance of his only Son:—*Held*, void, as by the Law of *Jersey* the Donor had no power to defeat the law of succession, by which, in the case of an only Son, the estate of the Father descended.

Pending an appeal the Respondent died intestate leaving children, who, by reason of litigation respecting their Father's right of succession, objected to be made Respondents. The Judicial Committee directed the petition to revive to stand over, with liberty to apply to the Royal Court of *Jersey* to appoint a proper person to represent the estate. The Royal Court appointed the Viscount of the Island as Official representative of the estate, and the appeal was revived in his name.

THIS appeal was brought from the unanimous judgment of the Superior number or Full Court of appeal of the Royal Court of the Island of *Jersey*, confirming a judgment of the Inferior number of that Court, whereby a voluntary Deed of gift, in favour of the Appellant, of real estate in the Island, was set aside and annulled at the instance of *Thomas La Cloche* the younger, the original Respondent, under the following circumstances:—

The Deed in question was, on the 12th of August, 1862, passed before the Royal Court of *Jersey* by *Thomas La Cloche* the elder, a native of the Island, and the Father of *Thomas La Cloche* the younger, and which *Thomas La Cloche* the elder was entitled to the property in question, which he by the above Deed affected to convey to the Appellant, *Thomas Philippe La Cloche*, who was the only Son of *Thomas La Cloche* the younger, whom he therein described as his "*petit fils*," and his heirs for ever. The Deed was expressed to be executed "*de sa libre volonté*," no pecuniary or valuable consideration being mentioned in it, or given or received for its execution.

Thomas La Cloche the younger, the Father of the Appellant, was born in the year 1793; but at the time of his birth his Father and Mother (then *Marguerite le Breton*) were not married. It appeared, however, from a certificate and declaration of the marriage, that they were subsequently married in *England* in June, 1854; and on that occasion, as well as on many others, *Thomas La Cloche* the younger was recognised by his Father as his child.

Thomas La Cloche the elder died on the 13th of October, 1864, leaving *Thomas La Cloche* the younger, who, in April, 1865, and within a year and a day from his Father's death, as his only Son

and heir-at-law, instituted the suit now under appeal, to set aside the Deed on the ground, that by the Law of *Jersey* it was not competent to his Father, by a voluntary Deed, to deprive him of his inheritance.

On the 29th of June, 1865, the cause came to a hearing before the Inferior number of the Court, when the Appellant (the Defendant in the Court below) prayed that the cause might be deferred until the termination of a suit respecting his Grandfather's Will (1), which was then depending before the same Court between himself and the Executors of the Will, alleging that the same questions as regarded the legitimacy of his Father were at issue in both causes. The Court adopted this view, and deferred the hearing until the suit relative to the Will should have been finally decided. On appeal from this decision the Superior number of the Court reversed the decision, and sent the parties back to prosecute the cause before the Inferior number.

In conformity with this judgment the cause was again brought before the Inferior number, when the Appellant disputed the late Respondent's title to sue as the legitimate Son of his Father. The Plaintiff, the late Respondent, in support of his title, put in evidence various documents, among which were *Actes* or decisions of the Royal and Ecclesiastical Courts in the Island, extracted from the Records of the Courts, shewing that, though born out of wedlock, he had, according to the Law of *Jersey*, been legitimated by the subsequent marriage of his parents; the certificate of which was put in evidence, coupled with his Father's recognition of him as his Son, both by a declaration signed on the day of the marriage, and by three subsequent Letters, in two of which he described the late Respondent as his Son, and by the Deed in dispute, in which he described the late Respondent's Son as his Grandson. The Appellant objected to the admissibility of this evidence, but the Court overruled the objection, and declared it admissible, and the cause was postponed.

On the 7th of October, 1869, the cause was again heard, and the Appellant again called in question the legitimacy of the Plaintiff, but the Court decided that "considering that the legitimation of a child born out of wedlock is made effectual by the subsequent

(1) See *La Cloche* v. *La Cloche*, Law Rep. 3 P. C. 125.

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marriage of the Father and Mother, and by recognition of the child; that in the present instance the marriage of *Thomas La Cloche* the elder with *Marguerite Le Breton* was established by the certificate produced, which proved that the marriage was solemnized in *London* on the 10th of June, 1854, and that the recognition of the Plaintiff by *Thomas La Cloche* the elder as his Son and of *Marguerite Le Breton* was made at the time of the marriage being solemnized; that by the documents, Letters, and other papers produced by the Plaintiff for the purpose of establishing the names, titles, and qualities which he claimed in this suit, it was established that *Thomas La Cloche* the elder had recognised the Plaintiff as his Son, notably by the Deed which was the subject of the present suit, in which *Thomas Philippe La Cloche*, Son of *Thomas La Cloche*, was designated as the "Grandson of *Thomas La Cloche* the elder;" and for those reasons the Court found that the Plaintiff had established his case.

The Appellant next, on the merits, contended that the property being acquired real property (*conquêt et acquêt*) purchased by the deceased, *Thomas La Cloche* the elder, the latter was entitled to dispose of it *inter vivos;* that there existed no law in *Jersey* which annulled a Contract or Deed passed under the circumstances; and that the Deed not having been passed by *Thomas La Cloche* the elder with a view to benefit one of his children to the prejudice of the other, the contention of the Plaintiff did not apply. The Court of Inferior number on this point also gave judgment, declaring that, as a person could not make a gift of his heritable property to one of his heirs, or to a descendant in direct line, that the Grandfather having made a gift of his realty to his Grandson to the prejudice of his Son and sole heir, the Plaintiff was entitled as heir, and annulled the Deed of the 12th of August, 1862, made by *Thomas La Cloche* the elder to the Appellant.

On appeal the Full Court of the Superior number unanimously rejected the Appellant's appeals from these decisions, with costs.

An appeal was preferred to Her Majesty in Council by the Appellant against this judgment of affirmance, in which *Thomas La Cloche* was made Respondent. Pending the appeal he died intestate, leaving two children, the Appellant and a Daughter, *Eliza Jane La Cloche*, the Wife of *Henry Strong*, and a Widow, him

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surviving. The Appellant presented a petition to revive the appeal against *Eliza Jane La Cloche* and the Widow, both of whom were interested, as against the Appellant, in contending that the real estate comprised in the Deed formed part of the estate of the Plaintiff and the then Respondent, *Thomas La Cloche.*

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Mr. *F. C. J. Millar* appeared for the Petitioner.

Mr. *Bagshawe*, for *Eliza Jane La Cloche* and the Widow,

Objected to being made Respondents on the appeal, as they were interested, as against the Appellant, in contending that the real estate comprised in the Deed formed part of the estate of the late Respondent, *Thomas La Cloche.*

THE LORD JUSTICE JAMES :—

The petition must stand over, with liberty to any of the parties to apply to the Royal Court of *Jersey* forthwith to appoint some person to represent the estate for the purpose of the appeal.

In consequence of this suggestion, on an application being made to the Royal Court, that Court, on the 14th of July, 1871, decided that, in the circumstances, the Viscount of *Jersey* was the proper person to represent the estate of the late Respondent, *Thomas La Cloche*, in the appeal, and by an Order in Council the appeal was ordered to be revived as against the Viscount of *Jersey* as Respondent thereto, as the official representative of the estate of the late Respondent, *Thomas La Cloche.*

1872
June 27.

The appeal now came on for hearing.

Mr. *F. C. J. Millar*, for the Appellant :—

First, the Plaintiff has not proved that he was the sole legitimate Son of *La Cloche* the elder. It is not in dispute that he was born out of wedlock ; and although he might, according to the law prevailing in *Jersey*, be legitimated *per subsequens matrimonium*, yet we submit, that there is not sufficient evidence, first, of the *factum*

* *Present* :—SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, and THE LORD JUSTICE MELLISH.

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of the marriage, or, secondly, of a formal recognition of him by *La Cloche* the elder as his Son. Neither is there evidence of cohabitation of the Mother of the Plaintiff and *Thomas La Cloche* the elder after the marriage. The evidence given of the marriage itself was insufficient; again, the declaration made by *La Cloche* the elder at the time of the marriage in *London*, was not made before a competent authority, and was not strictly proved in the cause. According to the law and custom of *Jersey*, the simple fact of marriage, even if proved to have taken place, would not be sufficient of itself to render legitimate all previously born children. It appears from the precedents filed in the cause (1), and admitted in the judgment of the Inferior number of the Royal Court, that the recognition of the child or children intended to be legitimated is an essential requisite. There must be a formal recognition of the child in the Ecclesiastical Court in the Island by the Father of the child, as his Son by his then Wife, in order to legitimise *per subsequens matrimonium* (2). But we submit, further, that the marriage which took place in *England*, according to English law, could not have the effect of rendering legitimate *La Cloche* the younger, the previously born child of the parents.

Secondly, no provision is to be found in the old Norman Law in force in *Jersey* for a case like the present. That Law only treats the question in respect to a case of competition of heirs, not with a sole heir. Neither does it touch the case of acquired real property. The Owner of acquired real property in *Jersey* is at liberty to alien and incumber such property, in which a distinction exists from inherited estate, in his lifetime, and thereby either wholly or partially to disinherit his heirs (3). Where there are several children, in the case of intestacy, the Law of *Jersey* requires the division of the estate in a certain prescribed manner. If the Owner gave it to one in preference to the rest, no doubt on his death such a Conveyance could be set aside within a year and a day, by his co-heirs as a fraud on the law of succession. Here, however, the case of the Appellant

(1) *Acte* of the Ecclesiastical Court of the Island of *Jersey*, 10th of April, 1675, between *Josué le Masurier* and *Jeanne Grandin*.

(2) *Acte* of the Ecclesiastical Court of the Island of *Jersey*, 26th of November, 1792, by which *Phil. Abert* and *Elizabeth Abert* his Wife, recognized *Elizabeth Abert* as their lawful child.

(3) Rep. of *Jersey* Comms. 1861, p. xvi.

is, that he is the only heir of *Thomas La Cloche* the elder; but a conveyance of the estate to the exclusion of an only child of the Donor is nowhere prohibited in the older authorities on Norman Law. The reformed *Coutume de Normandie* is not to be received as conclusive of the Law and Customs of *Jersey*. Although by that law a Deed of gift in the Father's lifetime to one of his co-heirs to the prejudice of the rest is impeachable, yet that rule does not apply here; there is no ground for impeaching or setting aside the Deed of gift to the Donor's Grandson.

Mr. *Field*, Q.C., and Mr. *Bagshawe*, for the Respondent:—

It is not in contention but that, by the Law and customs of *Jersey*, legitimation *per subsequens matrimonium* prevails. It is recognised in the *Isle of Man*, *Quane* v. *Quane* (1), and other Countries in *Europe* where the Civil Law prevails (2). With respect to the points raised by the Appellant, first, as to the admissibility of the Plaintiff's evidence in support of his title as Son and heir, we insist that the unanimous decisions of the Courts below, admitting as proofs the evidence filed, were correct, as those documents prove all the facts necessary to support the Plaintiff's title as Son and heir. The certificates of Baptism and Marriage, the declarations made thereon, and recognition of the Plaintiff by *Thomas La Cloche* the elder as his Son, were duly authenticated. The Letters addressed to the Plaintiff, recognising him as his "Dear Son," and the conveyance to the Appellant, in which he is described as his "Grandson," distinctly establish the requisite recognition of paternity required by the *Jersey* law and customs (3). Recognition of the child born before marriage may be in any form (4), as by the French Law: *Pothier, Traité du Contrat de Mariage, Tom.* V., c. 2, p. 432. Secondly, with respect to the suggested distinction urged by the Appellant, between acquired and inherited real estate, and between a Deed in favour of a Grandson to the prejudice of a Son, where there is only one Son, such assumed distinction is unfounded, and unsupported by authority, and contrary to the Norman Law authorities received and acted

(1) 8 Moore's P. C. Cases, 63.

(2) Ibid. note 74: see Burges' Comm. on Col. & For. Laws, vol. i. pp. 94, 101.

(3) Rep. of *Jersey* Comms. 1861, p. 543.

(4) *Acte* of the Royal Court of *Jersey*, 20th of January, 1647, between *Élie Pyrouet* and *Moysse Veneman*, *ca-ux.*, and others.

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on by the *Cour Royale* in *Jersey*. By such Law and Customs *Thomas La Cloche* the elder was absolutely forbidden to make a gratuitous donation to the disinheritance of his Son, and such Deed of donation was void (1). It is clearly within the principle of *Jersey* Law and Customs, as provided by the *Coutume réformée de Normandie* [Ed. 1727]; *Terrien's Comentaires de Droict Civil de Normandie*, tit. "Succession," [*Rouen* Ed.]; *Le Grand Coustumier de Normandie*, tit. "*de Testament*," 421 [Ed. 1742]; and, as decided by this Tribunal in *La Cloche* v. *La Cloche* (2).

Mr. *F. C. J. Millar*, in reply:—

The *Coutume réformée de Normandie* and *Terrien's* Commentaries, cited by the Respondent's Counsel, have no application to this case. They are of a date long anterior to the separation of *Jersey* from the Duchy of *Normandy*, and cannot be received as the present law of *Jersey*. As a question of fact the evidence is not sufficient to shew the recognition by *Thomas La Cloche* the elder of the Appellant as his legitimate child.

1872
June 28.

THE LORD JUSTICE JAMES:—

In this case, which is an appeal from the Island of *Jersey*, their Lordships are of opinion, that the judgment of the Royal Court, affirming the judgment of the first Court, must be affirmed.

Three objections were taken to the judgment, which declared a Deed of gift made in favour of the Appellant to be void. The case of the Plaintiff, the original Respondent, was, that he was the heir-at-law of his Father, and that he was deprived of his inheritance by a gift made in the lifetime of his Father, a gratuitous donation to his (the Plaintiff's) eldest Son, the Donor's Grandson, and that it was forbidden by the law of the Island so to disinherit a child. Both the Courts in the Island so held. But it was, on the part of the Appellant, contended that the character of heir was not proved; first, because the alleged heir was, beyond all question, originally the illegitimate child of a woman in the Island of *Jersey*, and his legitimacy depended upon that rule which applies in the Island of *Jersey*, namely, the rule that an illegitimate child may

(1) *Acte* of the Royal Court of *Jersey*, 25th of January, 1656, *Nicholas Le Suer, ca-ux.*, against *Amice Bisson*.

(2) Law Rep. 3 P. C. 125.

be legitimated *per subsequens matrimonium*. It was said, that there was no sufficient evidence of the *factum* of the marriage. It was also said that it ought to have been proved more strictly and more stringently than it was. The evidence of the marriage was first of all a certificate of the marriage, purporting to have been solemnized in *London*, between a person answering the description of the deceased, and a person answering the description of the woman, with their names, residences, and addresses, and a declaration in writing, purporting to be signed by the alleged Husband himself. The Court in *Jersey* had before them other documents admitted to be in the handwriting of that Gentleman; the handwriting must have been well known to a great many persons in the Island, and the genuineness of the document was not really disputed. Their Lordships must, therefore, hold that document well proved, and that document is a declaration of the Father made at the time before the Clergyman, and stating the object of the marriage to be for the purpose of legitimating the child.

That being so, it appears to their Lordships that there was sufficient evidence before the Court of the *factum* of the marriage. It was then contended that, although there was the *factum* of the marriage, there was not that formal recognition of the child which it was contended ought to have been made. It is not easy to see what was the particular character and nature of the recognition which it was alleged ought to have been made to give effect to it.

There was no authority cited to their Lordships, and no principle has been suggested to them, on which they can hold that there is any particular mode or form requisite to the validity of such a recognition. The principle in all these cases is, that where a man marries a woman who has had an illegitimate child, whether that child is thenceforth to be considered the legitimate child of the man must depend on the only evidence which can generally be given of it; that is to say, the man's recognition of his paternity—if that is sufficiently and abundantly proved, it does not signify in what particular manner that recognition is effected. In this case the recognition is abundant. First of all there is the declaration of the Father at the time of the marriage; the Letters to the Son, describing him as his Son, Letters in which the Father talks of the woman as his Wife; and, above all and beyond all, there is

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the Deed itself, on which the Appellant's own case proceeds, which is a gift to him as Grandson—as the Son of that Son. It is difficult to conceive any stronger recognition of paternity than where the Son not only is recognised, but the Son of that Son is recognised as the Grandson, in the very Deed which is the subject-matter of the suit.

Well, then, the character of the Plaintiff being established, the next question is, whether the gift to the Son of that Son is sufficient to deprive the Son of his right to his inheritance? It was contended that the law of *Normandy*, which is the law in the Island of *Jersey*, does not specifically provide for that case, that that law only deals, in terms, with a case of competition between heirs, the case where there are two or more heirs, in which case it was admitted that a man could not give a gift to one so as to disinherit another of any part of his inheritance. But it was said, that the case of giving away from an only child is nowhere comprehended in anything said in the older Books, and it was also contended that we could not look at what was called the Reformed Customs of the Duchy of *Normandy*. There seems upon that latter point to be a fallacy. These collections of Customs are not written laws at all; they are not legislative Acts within the letter of which persons are to be brought. They are written illustrations, written evidences, authoritative declarations of what the unwritten Common Law or custom of the Country was, and unless it can be shewn that in that to which their Lordships have been referred—the Reformed Custom—some new principle had been introduced by legislative or other sufficient authority in the Duchy of *Normandy*, subsequent to the separation, the Reformed Custom of the Duchy of *Normandy* can be looked at as evidence of what the old law was, just as *Coke upon Littleton* would be looked at as evidence in *Maryland* or *Virginia* of what the Common Law of *England* was, and just in the same way as the decisions of our Courts of Common Law and Equity to this day are admitted as evidence in every Country which has derived its law from *England* of what the old law was (1). Probably it is not very material for

(1) It appears that the customary Laws of *France* were reduced to writing by the authority of the French Crown, and were afterwards reformed by the same authority. By an *Ordonnance*, dated from *Montil les Tours*, in 1453,

the decision of this case to refer to it, but the Reformed Customs is evidence of what the law was understood to be. In the Reformed Customs it is said, that a person of the age of twenty years completed may give the third part of his inheritance, whether acquired or inherited, to anybody he likes *inter vivos*, "provided that the Donee is not an immediate heir of the giver or a descendant from him in the direct line." If that applies, of course that proviso would entirely exclude the claim of the Appellant here, who is in a direct line, that is to say, the Son of the Son of the Donor. But in the old Books it is said, (and it is to be borne in mind that this is merely an illustration of the law and an illustration of the principle, and is not intended to be an exhaustive enumeration of all the cases to which the law is applicable,) it is said, that when the Father has several Sons he cannot make of his inheritance one better than the other; and no one, be he Man or Woman, can give of his fief to any of those upon whom it ought to devolve, nor to their heirs who descend from them in direct line; but after his decease the fief that he holds and that which he has given shall be brought in and divided equally amongst the heirs. Now, supposing, in this particular case, instead of there being one Son, there had been two Sons, *A.* and *B.*, it is quite clear, that the Donor could not have given to the Son of *A.*, to the exclusion of *A.* and *B.*; and that gift being void, upon his death the property would

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all the Customs as they then stood, including the modifications by time, or Royal *Ordonnances*, were to be put in writing and submitted to the Sovereign approbation of *Parlement*. The King issued Letters Patent to assemble the three estates of each Province. The Royal Judges, Registrars, &c., were to send in statements of all the customs, usages, and styles, which were to be written in Books, and the whole were referred to each *Parlement*, who were to enact (*statuer*) and register them. This, it appears, was slowly accomplished during the reigns of *Charles* VIII., *Louis* XII., *Francis* I., *Henry* II., and *Charles* IX.

The first official embodiment (*reduction officielle*) of the Customs was not satisfactory, and a reformation was effected in 1580, the principal object of which was to supply certain omissions, and to modify certain dispositions, according to the changes that had taken place in the principles of Law (*les changemens survenus dans la jurisprudence*). The Customs so reformed became authoritative (*elles ont reçu partout le sceau de la sanction royale et le véritable caractère de loi*). *Institutes Coutumières, D'Antoine Loysel, Introduction Historique, par M. Dupin* and *M. E. Laboulaye* [Ed. *Paris*], 1846.

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have fallen to be divided, in the very terms of this rule, not between the Son of *A.* and *B.*, but between *A.* and *B.* It would be very singular if, where he could not give to the Son of *A.*, to the disinheriting of *A.* and *B.*, he could give to the Son of *A.*, to the disinheriting of *A.*, he being sole heir. The Court of *Jersey* held, that the principle applies to the case of the sole heir and the child of that sole heir, exactly in the same way as it would apply if the gift had been to the Son of one of several co-heirs. In all probability the particular case of disinheriting an only Son in favour of that Son's Son was not mentioned in the Books, because such a case had never come before the Courts for decision.

Their Lordships are of opinion that, upon the true construction of the legal propositions in the older Books, and the proper application of the principles of law involved, the Court of *Jersey* took the right view in saying that a gift to a person in a direct line from the heir was a gift which could not prevail against the descent of the property according to the laws of inheritance. Their Lordships are, therefore, of opinion, and will humbly advise Her Majesty, that this appeal be dismissed, and the decision of the High Court affirmed. The appeal, of course, must be dismissed with costs.

Solicitors for the Appellant: *Jones, Blaxland, & Son.*
Solicitors for the Respondent: *Saunders & Hawksford.*

WILLIAM HAY (COMMONLY CALLED LORD WILLIAM HAY) . . . . . } APPELLANT;

AND

WILLIAM GORDON . . . . . RESPONDENT.

J. C.*
1872
July 30, 31.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAUB.

Divorce à vinculo—Act of the Indian Legislature, No. IV. of 1869—*Delay in bringing suit—Limitation of suits Act, No. XIV. of* 1859—*Practice—Qualification of rule with respect to concurrent judgments on a question of fact.*

The Indian *Divorce Act*, No. IV. of 1869, sect. 7, provides, that in all suits and proceedings brought under that Act relief is to be given on principles and rules which, in the opinion of the Courts, are as nearly as may be conformable to the principles and rules which the Court for Divorce and Matrimonial Causes in *England* acts on and gives relief.

The alleged cause of action arose in 1859 or 1860, the misconduct of the Wife having come to the knowledge of the Husband in 1862. He took no steps till 1869, when he brought a suit in *India*, under Act, No. IV. of 1869, for a divorce *à vinculo*, charging his Wife with adultery with the co-Respondent *A.* and others. The suit was heard in the absence of *A.*, and the Wife did not appear. The Court of First Instance dissolved the marriage. On an appeal to the Chief Court, application was made to hear further evidence, as provided by the 17th section of the Act, which the Court refused, and by its decree confirmed the sentence of the first Court:—*Held*, by the Judicial Committee, that in the absence of *A.*, and the refusal to allow him to be examined to rebut the Plaintiff's case, and considering the inconclusive and unsatisfactory nature of the evidence, coupled with the long delay in bringing the suit, such decree of confirmation could not be maintained, and the sentence reversed, with costs, in the Courts below and on appeal.

The reservations contained in the *Limitation of suits Act*, No. XIV. of 1859, sect. 1, cl. 16, do not apply to suits for divorce *à vinculo*.

Although, as a general rule, the Judicial Committee will not reverse the concurrent findings of Courts in *India* on a question of fact, yet there may be circumstances to take such findings out of the scope of the general rule, as in the case of a divorce *à vinculo*, in which, by Act, No. IV. of 1869, sect. 17, a decree made by the Court of First Instance is only binding on confirmation by the Chief Court, which decree is not to be considered as a separate judgment.

IN this case the appeal was brought from the Chief Court of the *Punjaub*, which Court confirmed a decree *nisi* made by the Ad-

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

INDIAN ASSESSOR:—SIR LAWRENCE PEEL.

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ditional Commissioner of the *Umballa* Division, in a suit for the dissolution of the marriage of the Respondent and his Wife.

The suit was instituted by the Respondent under the Indian *Divorce Act*, No. IV. of 1869, intituled an Act "to amend the Law relating to Divorce (of persons professing the Christian religion) and Matrimonial causes in *India*." The Defendants were the Respondent's Wife, and the Appellant, who was joined as a co-Respondent.

The Respondent filed his petition on the 25th of June, 1869, in the Court of the District Judge of *Umballa*, and in the petition alleged, amongst other things:—First, that he was on the 19th of July, 1849, married to *Louisa Elizabeth Gordon*, then *Louisa Elizabeth Mercer*, Spinster, at *Loodiana*, in the *Punjaub*. Secondly, that from his marriage he lived and cohabited with his Wife at different places in *India*, and that there was no issue of the marriage. Thirdly, that in the year 1853, at *Mussourie*, Lieutenant *Watson* (since dead) and the Wife of the Petitioner on divers occasions committed adultery together. Fourthly, that in the years 1859 and 1860, at *Simla*, the Appellant, then Deputy Commismissioner at *Simla*, and since of No. 2, *Cleveland Row*, *St. James's*, *London*, was in the habit of visiting the House wherein the Petitioner's Wife was residing, and she in the habit of visiting the House wherein the Appellant was residing, and that on divers occasions during that period, the dates of which were unknown to the Petitioner, the Petitioner's Wife in those Houses committed adultery with the Appellant. Fifthly, that in the year 1860 the Petitioner's Wife, at *Simla*, committed adultery with divers other persons; and the petition prayed for a dissolution of the marriage, and that the Appellant be condemned in costs.

The petition was personally served upon the Petitioner's Wife, who did not appear, and has died since the institution of the suit. The Appellant was also personally served with the petition in the beginning of August, 1869, and on the 13th of that month he forwarded instructions to *India*, and on the 29th of September following, Counsel appeared for the Appellant, who by his answer denied the adultery and prayed that the petition might be dismissed as against him.

The cause was assigned for hearing on the 1st of October following, and was, at the instance of the Counsel for the Appellant,

adjourned to the 15th of that month, when the issues in the cause were settled, and the further hearing was fixed for November following.

No application for any further adjournment was made on behalf of either party, and on the 18th of November, 1869, the cause came on for trial before the additional Commissioner at the Court of *Umballa*, and on that day, and the following day, Witnesses were examined and cross-examined on behalf of the Appellant and Respondent, the substance and effect of whose examination is stated and commented upon in their Lordships' judgment.

On the 19th of that month the additional Commissioner, Mr. *J. W. Macnabb*, made a decree *nisi* for the dissolution of the marriage, and condemned the Appellant in costs.

This decree was remitted for confirmation, as required by sect. 17 of the Act, No. IV. of 1869, to the Chief Court of the *Punjaub*, when the Appellant filed a petition to that Court, submitting the following points:—First, that the suit was barred by limitation and unreasonable delay. Secondly, that the evidence as against the Appellant was not trustworthy, and was insufficient. Thirdly, that there was no corroboration in the Respondent's Letters of the evidence of the Witnesses for the Petitioner. Fourthly, that the Appellant had been prejudiced and taken by surprise by the speedy action of the Court below and by the non-existence of rules of practice. Fifthly, that the Appellant was, and always had been, willing to tender himself as a Witness in the cause, but that no special rules had been made, as required by the 62nd section of the *Divorce Act*, No. IV. of 1869, to govern the procedure and proceedings taken under that Act, and he prayed that if the petition was not otherwise dismissed as against him, his evidence might be taken by commission. Sixthly, that, other co-Respondents besides the Appellant should have been cited, and that the omission had prejudiced him in the matter of damages and costs.

The cause came on for hearing before the Chief Court, on the 23rd day of July, 1870, and after hearing Counsel on behalf of the Appellant and Respondent, that Court, consisting of the Judges *C. R. Lindsay*, *H. S. Cunningham*, and *J. S. Campbell*, declined to exercise the power vested in the Court under the 17th section of the Act, to direct further evidence to be taken for the Appellant;

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and after distinguishing the evidence in the cause, which the Court held admissible, from inadmissible evidence, made a decree confirming the decree *nisi* of the Additional Commissioner for the dissolution of the marriage, and condemning the Appellant in costs.

From this decree of affirmance the Appellant brought this appeal:—

Dr. *Deane*, Q.C., and Mr. *Leith*, for the Appellant:—

This is the first case appealed from *India* under Act, No. IV. of 1869, decreeing a divorce *à vinculo* on the ground of adultery on the part of the Wife. The only relief before that Act was a sentence of divorce *à mensâ et thoro*. It is an important consideration in this case to observe that the Courts in *India* have erroneously proceeded. Justice has miscarried in the Courts below, particularly by the refusal of the High Court on the application of the Appellant for further inquiry and a Commission to examine him in *England*, to allow additional evidence to be taken under the powers given to the Court by sect. 17 of that Act. The Court ought to have given effect to the Appellant's affidavit, which positively denied the adultery charged, and dismissed the suit, or to have ordered additional evidence. No rules or regulations for the practice of the Court, as directed by the 62nd section, have been issued; therefore, the Court was in this case governed by the rules and principles of the English Divorce and Matrimonial Court. The evidence against the Appellant was untrustworthy and insufficient. The mere inference, or presumption, that the adultery charged had been committed, and upon which the judgments of both Courts were really based, was not justified by the legal evidence in the suit.

Secondly, the Courts ought to have held that the plea that the suit was barred by the *Limitation of suits Act*, No. XIV. of 1859, s. 1, cl. 16, six years having elapsed. Even if the Act did not operate as a bar, the charge being a stale one, and great delay on the part of the Respondent having taken place, his petition ought on that ground alone to have been dismissed.

Mr. *C. E. Pollock*, Q.C., and Mr. *R. A. Pritchard*, for the Respondent:—

First, the *Limitation of suits Act*, No. XIV. of 1859, sect. 1, cl. 16, cannot apply to a suit for divorce. That Act is limited to

he purposes prescribed in it, and no general words of reservation n respect to limitation of suits can be imported so as to operate as a bar to a suit seeking a divorce *à vinculo*. The *Divorce Act*, No. IV. of 1869, sect. 7, provides, that the relief shall be governed by the same principles as are administered by the Divorce and Matrimonial Court in *England*. No English Statute of Limitations n this Country is a bar to such a suit as this. Secondly, there vas no unreasonable delay in bringing the suit: the Appellant was esiding in *England*. Thirdly, we submit, that the proceedings in he Court below were in every respect regular. The Appellant vas represented by Counsel, who had ample opportunity of apply- ng to the Court of First Instance to adjourn the cause for examina- ion of the Appellant, if necessary, but he did not do so. Here he native Witnesses were examined *vivâ voce* before the District Judge, who was well qualified from personal observation to decide s to the credibility of their testimony. Lastly, it is a general rule f this Tribunal not to disturb concurrent judgments of the Courts elow in a question of fact: *Thurburn* v. *Steward* (1).

SIR ROBERT COLLIER :—

This is an appeal brought by Lord *William Hay*, the co-Respon- lent, against a judgment of the Chief Court of the *Punjaub*, con- irming a judgment of the Additional Commissioner at *Umballa*, whereby Colonel *Gordon* obtained a dissolution of his marriage with his Wife on the ground of her adultery with Lord *William Hay*, nd Lord *William Hay* was ordered to pay the costs of the suit.

Before the year 1869, the Courts in *India* had only power to decree divorces *à mensâ et thoro*. The power of the Court of Divorce in this Country of granting divorces *à vinculo*, was first ntroduced into *India* by Act, No. IV. of 1869, which by sect. 7 enacts, that subject to its provisions "the High and District Courts hall in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which he Court for Divorce and Matrimonial causes in *England* for the ime being acts and gives relief." There is a power given in the 32nd section to make rules and regulations not inconsistent with the

(1) Law Rep. 3 P. C. 478.

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Act and the Code of Civil Procedure in *India*. But it appears that no rules or regulations have been made, and, therefore, the principles and rules which obtain in the Divorce Court in this Country are, as nearly as may be, to be applied in *India*. Power is given to District Judges, in the first instance, to hear divorce causes, but their decrees are not final, or, indeed, operative at all, until confirmed by the Decree of the High Court, which Court is empowered to direct further inquiry to be made or additional evidence to be taken.

In this case the High Court was the Chief Court of the *Punjaub*.

The first question which has been raised is, whether or not the *Act of Limitations of suits* is a bar to this suit? It is argued that the cause of action arose in the year 1859 or 1860, when the acts of adultery are said to have been committed, or at all events in the year 1862, when Colonel *Gordon* says that the misconduct of his Wife came to his knowledge. Act, No. XIV. of 1859, after prescribing particular terms of limitation for certain actions, enacts by sect. 1, cl. 16, that with respect to all suits and actions not before specifically provided for the term of six years shall apply, that is six years from the time when the cause of action accrued. Their Lordships are of opinion, that the provisions of that Act do not apply to suits for divorce *à vinculo*, which at the time when it passed were unknown in *India*. They are confirmed in the view which they have taken of the intention of the Legislature by the *Limitation of suits Act*, which was passed last year (Act, No. IX. of 1871), which by sect. 1, expressly enacts, that its provisions shall not apply to suits under the Indian *Divorce Act*.

The Appellant further relied substantially upon two grounds, the first was that justice had not been done him in this suit, inasmuch as he ought to have had an opportunity of being examined in this Country by a commission; and, secondly, that upon the general merits of the case the decree was wrong.

With respect to the first question, the material facts appear to be these. The alleged adultery was in the years 1859 and 1860. The Petitioner does not aver with any particularity at what time in those years the acts of adultery were committed. Lord *William Hay* left *India* in 1862, and has resided in *England* ever since. In 1862 Colonel *Gordon* says he became aware of his Wife's adultery by what he regarded as a confession by her, in a Letter which

will be subsequently referred to, and that at that time he endeavoured to establish a case by the examination of Witnesses in *India;* but it would appear that those very Witnesses, who have been now called for him, at that time either could not, or would not, give evidence sufficient to establish his case. This suit was instituted in June, 1869. Lord *William Hay* for the first time heard of it on receiving the summons in the beginning of August in that year. Upon that he immediately took what undoubtedly was the proper proceeding of applying to an able Counsel for his opinion, and that Counsel advised, in substance, that application should be made to the Court in *India* for further particulars, and upon these particulars being obtained, for a commission for the examination of Lord *William Hay.*

Lord *William Hay,* upon the 13th of August, 1869, wrote to Mr. *Chisholm,* at *Simla,* who held a power of attorney from him, enclosing a copy of his Counsel's opinion, and requesting that an Advocate might be retained for him to act upon the instructions therein contained. It appears that Mr. *Cunningham* was so retained, but it does not appear that this Gentleman acted in conformity with those instructions, the reasons for his not so acting do not appear.

The cause was heard before the Commissioner of *Umballa,* on the 18th and 19th of November, 1869. The Commissioner pronounced against Lord *William Hay,* decreeing a dissolution of the marriage on the ground of adultery with him, and condemning him in costs. Lord *William Hay* states in his affidavit, that he was not aware of this decision until January of the next year, 1870, when he received a short report of the case in the *Mofussilite* Newspaper; that he then sent out an affidavit (which appears in the record), denying his guilt, stating a variety of circumstances, and among other things, setting out the opinion of Counsel above referred to. In pursuance of that affidavit, and a petition which he also sent to *India,* it appears that his Counsel, Mr. *Plowden,* before the Chief Court of the *Punjaub,* upon the 19th of May, presented a petition to that Court, containing various grounds of defence, and stating this, among other things, that "The co-Respondent is, and always has been, willing to tender himself as a Witness in the case, and prays that, if the petition be not otherwise dismissed as against him, his

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evidence may be taken by commission." Upon the hearing of the cause before the Chief Court of the *Punjaub*, in July, 1870, the Court declined to comply with this request, on these grounds; they say: "We see no likelihood of any sort of advantageous result from the issue of a commission. We have Lord *William Hay's* positive denial on oath on the record, and though we should be anxious to offer a litigant so circumstanced every possible facility and indulgence in the hearing of the case, it is not, we think, necessary, and would not, therefore, be expedient now, at the last moment, to re-open the proceedings by the grant of a commission which could scarcely bring any new fact before us, would place Lord *William Hay's* disavowal in no stronger a light, and would postpone the relief prayed for," and the Court subsequently made this observation: "With regard to the co-Respondent, we have further to remark, that his explanation of his proceedings is not, in our opinion, satisfactory, and that we cannot regard the course which he has pursued as in any degree adequate to the gravity of the occasion, or as indicating a serious intention to resist the present proceedings."

Their Lordships are not able to agree with the Chief Court that Lord *William Hay's* general denial in the affidavit, is at all equivalent to what would or might have been a circumstantial denial by him of the facts stated by the Witnesses, or an explanation of these facts, upon an examination by a commission; and they are also unable to agree with the Chief Court in the remark, that they cannot regard the course pursued by him as adequate to the gravity of the occasion, or as indicating a serious intention to resist the proceedings. Their Lordships see no reason to doubt that Lord *William Hay* has all along, seriously and earnestly desired to resist these proceedings to the best of his ability.

Upon this part of the case their Lordships have come to the conclusion, that it would have been desirable and proper, under all the circumstances, to accede to Lord *William Hay's* application for a commission to examine him.

But their Lordships do not rest their decision upon this ground. After giving the whole case their best consideration, they have come to the conclusion that there is no sufficient evidence upon which this decree against Lord *William Hay* can be supported.

In their Lordships' opinion, the evidence against Lord *William Hay* is entirely that of the native Witnesses. Before coming to this, however, it is well to make an observation upon other evidence which was admitted in the case, and which undoubtedly was admissible as against the Respondent, Mrs. *Gordon*, viz. her own confessions, or what are contended to have been her own confessions. As far as the correspondence is concerned, the only passage which in any way bears upon her relations with Lord *William Hay*, is the following in Letter "H," which must have been written somewhere about April, 1862, from *England*, to her Husband then in *India*: "I have your Letters as to what occurred at *Simla*. *Herbert* always told me that you knew of it, and did not care. Lord *William Hay* told me the same thing. *Herbert* always told me that *Emily* knew of it, and I firmly believe that both you and she did." What she is writing about here is clearly misconduct of her own, and it may be assumed to be adultery with a Gentleman at *Simla*, referred to by the name of *Herbert*. It appears that the person here designated as "*Herbert*," told her that her Husband knew of this adultery, and did not care. She also says "Lord *William Hay* told me the same thing." It appears to their Lordships, that the view taken of this expression in her Letter by the Court above is more correct than that taken by the Court below, viz. that it does not amount to a confession on her part of any adulterous intercourse with Lord *William Hay*, but merely to a statement of a conversation with him on the subject of her misconduct with another person, and her Husband's supposed sentiments regarding it.

On this part of the case—the Lady's confessions—a Mrs. *Byrne* is called, who lives at *Simla*, and whose House Mrs. *Gordon* rented. This Lady is the Grandmother of a Mr. *Johnson*, who was retained in this case to get up the evidence on the part of Colonel *Gordon*, and she does speak to a communication from Mrs. *Gordon* which would undoubtedly lead to the inference that she had committed adultery with Lord *William Hay*. It is certainly somewhat remarkable, as has been forcibly remarked by Dr. *Deane*, that this Lady should, if the statement be correct, not have communicated it in 1862 to Colonel *Gordon*, who was then attempting to procure sufficient evidence to obtain a divorce, as Mrs. *Byrne* must probably have well known.

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Their Lordships have thought it necessary to say a word upon this part of the case, although no statements of Mrs. *Gordon*, written or verbal, are, according to well-known principles of law, admissible against Lord *William Hay;* and they now refer to the only evidence against him, which is that of the native Witnesses. Without going through that evidence in detail, it may be enough to say, that part of it is simply hearsay, and of an extremely unsatisfactory and loose character, to say the least of it, such as that of *Boonah*, who speaks of having seen a Horse tied up near Mrs. *Gordon's* House at twelve o'clock at night, which she heard from some Grooms was the Horse of Lord *William Hay*, those Grooms not being called. There is evidence of Lord *William Hay* coming to the House on a good many occasions and dining there very frequently, but that is not evidence which, if taken alone, would at all lead to the inference of adultery. There is the evidence of a *Jampan* Bearer to the effect, that on three occasions he, together with other Bearers (it appears there would be four Bearers of the *Jampan*), took Mrs. *Gordon* to Lord *William Hay's* House about eight or nine o'clock at night, it does not appear at what time in the year. According to his account, the *Jampan* Bearers and the *Jampan* remained outside, visible to all persons who might be passing, which would not point to the conclusion that the visits were of an adulterous or even of a clandestine character. Further, there is the evidence of a man of the name of *Torab*, who had been in the service of Colonel *Gordon* from the year 1856 down to the present time, and this is the only Witness who speaks of any familiarities between Lord *William Hay* and Mrs. *Gordon*. His statement is to the effect, that Lord *William Hay* frequently came to Mrs. *Gordon's* House when her Husband was absent (indeed her Husband does not seem to have been much at *Simla*), that Lord *William Hay* came to dinner two or three times a week, sometimes in company, sometimes alone, and the Witness goes on to say, that when he would take away the Coffee, Mrs. *Gordon* and Lord *William Hay* would be sitting on a sofa together, he with his arm round her waist. This Witness appeals in confirmation of his statements to the evidence of an *Ayah* of the name of *Peerun*, who, if not supposed to have witnessed the same familiarity, still was constantly in the House, and would, of course,

perfectly well know, whether Lord *William Hay* was there frequently or not. *Torab* says, that the *Ayah* was aware of the frequency of Lord *William Hay's* visits, and of the familiarity between Lord *William Hay* and Mrs. *Gordon*, and that he and the *Ayah* were in the habit of discussing it together, and both of them discussing it with Mrs. *Byrne*. He also states that, in the year 1862, when he was in Colonel *Gordon's* service, upon Colonel *Gordon* questioning him concerning the facts to which he was then deposing, he denied all knowledge of them; he adds, "last year Colonel *Gordon* gave me great encouragement" (*dilasa* is the native word) "to speak the truth, and promised to forgive me everything if I would; then I told the *Sahib*."

The *Ayah*, *Peerun*, upon being called, contradicts the evidence of *Torab;* and is, in fact, a Witness in favour of Lord *William Hay*. She, instead of confirming the account which *Torab* had given as to Lord *William Hay's* frequent visits and his intimacy with Mrs. *Gordon*, says: "I was in Mrs. *Gordon's* service about nine years ago. Know of nothing between her and Lord *William Hay*. He only called on her twice to my knowledge;" this entirely agrees with Lord *William Hay's* own account in his affidavit, where he says, that he only called twice upon Mrs. *Gordon;* one of his visits being to a certain extent on a matter of business, and that he dined once in the House of Colonel *Gordon*. She does speak, and so does one other Witness, to an occurrence, certainly somewhat extraordinary, viz. Mrs. *Gordon* going to Lord *William Hay's* House at night, or late in the evening, breaking some of his windows and cutting some creepers outside the House. *Pursoo*, the other Witness who speaks to this transaction, represents that Lord *William Hay* declined to have anything to say to her. He says, "I told the *Sahib;* he said, if she won't go send for the guard, as she was drunk and might strike me with the Knife. I persuaded her to go home." That is all we know of that transaction, which certainly appears to their Lordships to be no evidence of adultery.

It has been already said that their Lordships are of opinion, that the only evidence against Lord *William Hay* was that of the native Witnesses. It is true that the Chief Court does speak of that evidence as being corroborated in one highly important

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particular by Mr. *Johnson*, the Gentleman who was employed to get up the case. But their Lordships do not take the same view of the evidence of Mr. *Johnson*. The passage to which the Chief Court refers would appear to be this: "One morning I was taking my early ride about 7 or 7·30. I saw Mrs. *Gordon* coming down the steps which lead out of *Littlewood;* the *Ayah* was with her. I passed close to her but did not speak; her hair was hanging down." It does not appear to their Lordships that the fact of Mr. *Johnson* meeting this Lady between 7 and 8 o'clock in the morning in company with a maid walking down steps, which would seem to be public ones, leading, it is true, to Lord *William Hay's* House, but also to other places, does afford any corroborative evidence which can be relied on of the statements of the native Witnesses.

The case, therefore, in their Lordships' view, as far as Lord *William Hay* is concerned, resolves itself into this: the only part of the evidence of any importance is that of a native servant who in 1862 denied all knowledge of what he asserted in 1869, and this servant is contradicted by a fellow servant whom he vouches. Lord *William Hay* must be taken, as the Chief Court of the *Punjaub* properly assumes, to have given a general denial of the truth of this evidence; if that denial has not been specific, and has not been tested by cross-examination, the fault, having regard to his desire to be examined on commission, cannot be regarded as his.

Under these circumstances, their Lordships have come to the conclusion that this decree cannot be maintained.

Their Lordships are not unmindful that they have on more than one occasion, laid it down as a general rule, subject to possible exceptions, that they would not reverse the concurrent findings of two Courts on a question of fact. But they consider that the circumstances of this case are of so peculiar a character as to take it out of the scope of that general rule. They are dealing with a jurisdiction of an important and delicate character, new to the Courts of *India*. This is certainly the first case which has come before their Lordships, and probably not many suits of this description have been tried in *India*. It is to be observed, that in this case it can scarcely be said that there have been two separate

judgments, inasmuch as the Legislature has not thought it safe to entrust the Court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit. It is further to be observed that the Court below was clearly wrong in accepting as evidence against Lord *William Hay* the statements of Mrs. *Gordon*, and regarding those statements as confirming the credibility of the evidence of the native Witnesses against him. It is true that the Chief Court distinguishes between the evidence which was admissible as against Mrs. *Gordon*, and that which was admissible as against the co-Respondent. At the same time they attach a good deal of importance to the finding of the Judge below upon the credibility of the native Witnesses, based as that finding was in a great measure upon evidence not admissible.

For these reasons their Lordships have come to the conclusion, that it is not one of the cases to which the ordinary rule above mentioned should be applied.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse so much of the decree of the Chief Court of the *Punjaub* as is appealed against, and in lieu thereof Order that the suit be dismissed as against Lord *William Hay*, with the costs in the Courts below and the costs of this appeal.

Solicitor for the Appellant: *G. M. Clements, for Bircham & Co.*
Solicitors for the Respondent: *Pritchard & Sons.*

J.C.* THOMAS BYARD SHEPPARD . . . . . APPELLANT;

1870

AND

March 26. THE REV. W. J. EARLY BENNETT, CLERK RESPONDENT.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

FIRST APPEAL.

Commission under Church Discipline Act, 3 & 4 *Vict. c.* 86—*Frame and substance of, when followed by Letters of Request and Citation—Sufficient to state in such the generic nature of the offence to found the charge in the Articles to be afterwards exhibited—Articles charging publication of heretical Doctrines contained in Works referred to, struck out, as not shewing adoption of such Doctrines by party charged.*

A Commission issued by the Bishop, in pursuance of the *Church Discipline Act*, 3 & 4 Vict. c. 86, is merely a preparatory step to ascertain, whether or not, there is sufficient *primâ facie* case for further inquiry before a regular Tribunal. It is not necessary, therefore, to state in such Commission more than the generic nature of the offence, sufficient to found the Articles on, and to give the party proceeded against notice of the general nature of the charges he is called upon to answer, and which must be fully specified in the Articles to be exhibited.

A Commission having been issued by the Bishop to inquire as to the grounds of a charge against a Clergyman of the Church of *England* of publishing heretical doctrines in certain works, "containing (as alleged) the following, among other, printed and published statements"—which were specially set forth. The Commissioners reported that there was sufficient *primâ facie* ground for instituting further proceedings, and the Bishop sent the case to the Arches Court by Letters of Request, which recited the Commission, with the extracts set out in it, and the Commissioners' Report, which contained the same extracts, requesting the Court to cite the accused Clergyman to answer a charge of publishing heretical doctrines in the Works named and specified in the Commission. A Citation was issued, which recited the Letters of Request in full, with the extracts appearing in it. Articles were then filed, which charged the Defendant with publishing, in addition to the heretical doctrines appearing in the extracts set out in the Commission, Letters of Request, and Citation, other heretical doctrines of a distinct kind, impugning the 29th Article of Religion, in passages taken from the same Works, but not before set out or indicated, save under a general alle-

* *Present*:—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK (DR. THOMSON), THE BISHOP OF LONDON (DR. JACKSON), SIR JOSEPH NAPIER, and THE LORD JUSTICE GIFFARD.

gation, that the Works contained "other statements;" which latter doctrines, if asserted, as alleged, were so by reference to Works of other Authors:—*Held*, by the Judicial Committee on appeal, upon a motion to admit the Articles to proof, that having regard to the true meaning of the additional passages, the Articles must be reformed by striking out the charge of publishing the latter doctrines impugning the 29th Article of Religion, on the ground that the passages cited or referred to as the opinions of other Authors, were not sufficiently shewn to have been adopted by the Defendant, in the passages extracted from his Works, to justify and support such charge.

The doctrine of the Real Presence is not a doctrine in contravention of the 29th Article of Religion.

The rules regarding the frame and substance of Articles of charge for heresy against a Clergyman, laid down in *Williams* v. *The Bishop of Salisbury* (1), referred to and approved.

THE original cause, which gave rise to this and the subsequent appeal, was instituted in the Arches Court of *Canterbury* by the Appellant, *Thomas Byard Sheppard*, of the Parish of *Frome Selwood*, in the County of *Somerset*, against the Respondent, the Rev. *William James Early Bennett*, Clerk, the Vicar of the same Parish.

The cause was promoted in the Arches Court by Letters of Request from the late Bishop of *Bath* and *Wells*, in whose Diocese the Respondent's preferment was situate. The Letters of Request were issued upon the report of the Commissioners appointed by the Bishop of *London* under the Statute, 3 & 4 Vict. c. 86, who were empowered to make inquiry as to the grounds of a certain charge made by the Appellant against the Respondent; such charge being, that the Respondent had committed an offence against the Laws Ecclesiastical, by having caused to be printed and published certain Works, in which he advisedly maintained or affirmed doctrines, directly contrary or repugnant to, the Articles and Formularies of the Church of *England* and *Ireland*, in relation to the Sacrament of the Lord's Supper; the said Works being entitled respectively, "Some Results of the Tractarian Movement of 1833," forming one of the Essays in a volume entitled "The Church and the World, edited by the Rev. *Orby Shipley*, Clerk," printed and published in *London*, in the year 1867;—"A Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*, D.D., Regius Professor of Hebrew, and Canon of Christ Church, *Oxford*, Second Edition," printed and published in *London*, in the year 1867;—and "A

(1) 2 Moore's P. C. Cases (N.S.) 375.

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Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*, D.D., Regius Professor of Hebrew, and Canon of Christ Church, *Oxford*, Third Edition;" printed and published in *London*, in the year 1868: and containing certain extracts and statements in respect of the charge, therein set forth, and whereon the Commissioners had unanimously reported that there was a sufficient *primâ facie* ground for instituting further proceedings.

In pursuance of these Letters of Request a Citation issued, citing the Respondent to appear and answer certain Articles touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more particularly for having offended against the Laws Ecclesiastical, by having within two years last past caused to be printed and published within the Diocese of *London* certain Works in which he advisedly maintained or affirmed doctrines directly contrary or repugnant to the Articles and Formularies of the United Church of *England* and *Ireland*, which Works were more particularly specified and set forth and quoted in the Letters of Request thereinbefore recited, and so accepted, as aforesaid, at the voluntary promotion of *Sheppard;* and further to do and receive, as unto law and justice shall appertain, under pain of law and contempt thereof.

The Citation having been duly served, and no appearance given in, by, or on behalf of the Respondent, Articles were filed in accordance with the practice of the Court, and the Judge appointed to hear on the admission thereof.

A copy of such Articles, and notice of the time appointed for hearing on the admission thereof, was duly sent to the Respondent.

The Articles thus exhibited were thirty-four in number (1), setting forth in detail the passages from the Works printed and published by the Respondent, which contained the doctrines complained of as being contrary and repugnant to the Articles and Formularies of the Church—and pleading such Articles and Formularies as were alleged to be specially impugned. The specified heresies, as contained in the Respondent's Works, were the impugning and contravening the 29th Article of Religion "Of the Wicked which eat not the Body of Christ in the use of the Lord's Supper;" the

(1) The substance of them, and the principal allegations contained, are set forth in the second appeal in this case, *post*, p. 375.

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maintaining and affirming the actual presence of our Lord in the Sacrament of the Lord's Supper—the visible presence of our Lord upon the Altar or Table of the Holy Communion—that there is a Sacrifice at the time of the celebration of the Eucharist—and that adoration or worship is due to the Consecrated Elements of the Lord's Supper. Counsel were heard on the admission of the Articles, on the part of the Promoter, the Appellant, the Respondent not appearing, as before, and the cause therefore being heard *in pœnam.*

On the 30th of October, 1869, the Judge of the Arches Court (The Right Hon. Sir *Robert Phillimore*) gave judgment upon the admission of the Articles, directing such Articles to be reformed by omitting all such parts thereof (as were contained in the 5th, 6th, 7th, 12th, 18th, 25th, and 29th Articles), as charged the Respondent with contravening the 29th Article of Religion, entitled, "Of the Wicked which eat not the Body of Christ in the use of the Lord's Supper" (1).

The learned Judge founded his decision on two grounds: first, that this particular charge of heresy was not preferred before the Commissioners, on whose report the subsequent proceedings were founded, and that it was not mentioned in the Letters of Request, or in the Citation; and secondly, that the heresy charged was one alleged to be contained in an Essay or Review upon Ecclesiastical events in the Church since the year 1833; referring to a trial against another Clergyman, who was condemned by the then Archbishop of *Canterbury*, whose sentence was reversed, and against whose sentence a Protest was signed by seventeen Clergymen, of whom the Respondent was one, and that for what was contained in that Protest, though in a Work not mentioned in the Citation, the Respondent had made himself responsible.

The first appeal was from this Decree.

1869 *Dec.* 2.

A day having been appointed, the appeal came on for hearing on the 2nd of December, 1869, when it was discovered that in consequence of the Respondent not having appeared, the appeal could not, under the 14th of the Rules for appeals in Ecclesiastical Causes, be then heard. That Rule provides that "as soon as the

(1) See case on the admission of the Articles, 39 L. J. (Ecc.) p. 1.

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time allowed for bringing in the Case (*i. e.*, a month from the printed copy of the Appendix being brought in) has expired, the appeal shall stand for hearing before the Judicial Committee; provided that where no appearance has been entered a period of four months has expired from bringing in of the Printed Petition of appeal."

The appeal was accordingly directed to stand over until four months had elapsed from the bringing in the petition of appeal, and now came on for hearing.

Mr. *A. J. Stephens*, Q.C., Dr. *Tristram*, Mr. *H. Cowie*, and Mr. *B. Shaw*, appeared for the Appellant.

The Respondent did not appear either by Counsel or in person.

Mr. *A. J. Stephens*:—

The Dean of the Arches has directed the Articles exhibited against the Respondent to be reformed by omitting all such parts thereof as charged the Respondent with contravening the 29th Article of Religion; and he states two grounds for his decision. First, that this particular charge of heresy was not preferred before the Commissioners, on whose report the subsequent proceedings are founded, that it was not mentioned in the Letters of Request, or in the Citation; and, secondly, that this charge is not on account of a heresy distinctly stated or uttered in any Sermon or public act of preaching, or statement connected with the discharge of his duties as Incumbent of the Parish committed to his charge; but is a heresy alleged to be contained in an Essay or Review upon Ecclesiastical Events in the Church since the year 1833, and is extracted from what purports to be an historical statement of a trial against another Clergyman as long ago as the year 1856; in which the Author narrates that Archdeacon *Denison* was condemned by the then Archbishop of *Canterbury* for teaching the Real Presence; that the sentence was reversed, that a Protest against the Archbishop's sentence was signed by seventeen Priests, and of these the Defendant was said to be one; and it is alleged that by this reference to the Protest, which is in a Work not mentioned in the Citation, the Defendant has made himself responsible in this suit for what is contained in that Protest.

Now, upon both these grounds, we contend, that the learned

Judge is wrong. First, the jurisdiction of the Arches Court is not founded on or limited by the charges brought before the Commissioners. The Commissioners are a mere Council of advice to the Bishop; that was Lord Justice *Knight Bruce's* opinion in *Ditcher* v. *Denison* (1); and though the point was not distinctly decided in *The Bishop of London* v. *Bonwell* (2), it not being directly in issue, yet enough is stated in the judgment in that case to shew, that it was clearly the opinion of their Lordships, that the Court of Arches may entertain and adjudicate upon charges not reported by the Commissioners as fit to be inquired into, if such charges are properly pleaded in the Articles exhibited: *Sanders* v. *Head* (3); *Simpson* v. *Flamank* (4). The learned Judge grounds his opinion on the case of *Homer* v. *Jones* (5), decided by Sir *Herbert Jenner Fust* in 1845. But assuming the report of that case to be correct, which is very doubtful, the language used does not justify the conclusion of the Court as applied to the facts here. It appears that the Article inserted contained the charge of an offence not committed within the jurisdiction of the Bishop of the Diocese who issued the Commission, which, even if the principle of the decision is right, is widely different from the case here. But assuming the jurisdiction of the Arches Court to be limited by the charges before the Commissioners, the judgment of the Dean of the Arches is wrong, for the general charge is the same in the Commission, the Letter of Request, and the Citation and Articles, namely, that of publishing certain works containing false doctrine. The extracts are mere items of evidence, and those set out are given as some "among the statements." What is necessary to set out in a Citation, and greater particularity cannot be required in any previous proceeding, is shewn in *Steward* v. *Francis* (6); *Francis* v. *Steward* (7); *Rex* v. *Wilkes* (8); *Heath* v. *Burder* (9); *Williams* v. *The Bishop of Salisbury* (10); *Simpson* v. *Flamank* (11); *Flamank* v. *Simpson* (12); *Brookes* v. *Crosswell* (13); *Roger's* Eccl. Law, tit. "Process." Those authorities shew, that the Citation need not

(1) 11 Moore's P. C. Cases, 324, 341.
(2) 14 Moore's P. C. Cases, 410, 411.
(3) 3 Curt. 48; S. C., 4 Moore's P. C. Cases, 186.
(4) Law Rep. 1 P. C. 468.
(5) 9 Jur. 167.
(6) 3 Curt. 214.
(7) 5 Q. B. 995.
(8) 2 Wils. 158.
(9) 15 Moore's P. C. Cases, 1.
(10) 2 Moore's P. C. Cases (N.S.) 375.
(11) Law Rep. 1 P. C. 469.
(12) Law Rep. 1 A & E. 280.
(13) 3 Curt. 42.

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apprise the Defendant of more than the nature of the charge. Here the extracts set out were not given in such a way as to limit the charge to the heretical doctrines appearing in them. Even if the extracts in the Citation do limit the Articles to charges of the same heresy, the Decree of the Arches Court is wrong, as the doctrine of reception of the Eucharist by the wicked is inseparable from the doctrine of the Real Presence.

With regard to the second ground of objection taken by the learned Judge, we maintain, that the Articles, relying upon an adoption by reference, ought, in accordance with the principles held and acted on in Law and Equity, to be admitted to proof: *Rex* v. *Slaney* (1); *Thornton* v. *Stephen* (2); *Darby* v. *Ouseley* (3); *Watts* v. *Fraser* (4); *Pentelow's Case* (5); *Hall* v. *Tokelove* (6); *Fry and Greata* v. *Treasure* (7). An application for a *Mandamus* commanding the issue of a Commission by the Bishop of *London* to inquire as to the grounds of charges founded on another Work of the Respondent, in which he had maintained the doctrine of the reception by the wicked, was refused by the Court of Queen's Bench (8), on the ground, in part at least, that the same charges were involved in the present proceedings. In *Sheppard* v. *Phillimore* (9) it was held that a Bishop may at his discretion send Letters of Request to the Arches Court in proceedings under the *Church Discipline Act*, 3 & 4 Vict. c. 86, without assigning his reasons for so doing, and that the Dean of the Arches must accept them: *à fortiori*, the charges in the Articles must be in the discretion of the Bishop.

THE LORD CHANCELLOR:—

The appeal presented to the Committee upon this occasion is an appeal from a decision of the Judge of the Court of Arches, by which he has directed certain Articles that have been brought against the Rev. *William James Early Bennett* to be reformed "by

(1) 5 C. & P. 213.
(2) 2 Moo. & R. 45.
(3) 1 H. & N. 7.
(4) 7 C. & P. 369.
(5) Law Rep. 4 Ch. 179.
(6) 2 Rob. Ecc. Cas. 322.
(7) 2 Moore's P. C. Cases (N.S.) 552.
(8) No report of this application for a *Mandamus* made on the 26th of April, 1869, is to be found in the Queen's Bench Reports, but the substance of the argument at the Bar, and the grounds stated by the Judges for their refusal of the application, are fully stated in a Pamphlet published by B. Shaw, M.A., Barrister-at-Law. 8vo. pp. 39: London, 1869.
(9) Law Rep. 2 P. C. 461.

omitting all such parts thereof as charge the Respondent in the appeal with contravening the 29th Article of Religion, entitled 'Of the Wicked which eat not the Body of Christ in the use of the Lord's Supper;'" and the learned Judge came to that conclusion upon two distinct grounds, both of which have been argued before us. We have not had the advantage of hearing Counsel on the other side, in consequence of Mr. *Bennett* not appearing in the course of these proceedings; but, having heard the case very ably and fully argued by Mr. *Stephens*, we feel ourselves in a condition to pronounce the conclusion at which we have now arrived, namely, that the learned Judge's decision is correct,—although, as there are two grounds upon which that decision was rested, we feel it necessary to explain upon which of those two grounds we think it right to agree with him in his conclusion.

Their Lordships cannot concur in the view which he appears to have taken as the first ground upon which he rested his decision; but they think that the second ground which he took, and which goes more to the merits and substance of the case, is a substantial ground, and one upon which the Decree may well be, and ought to be supported.

He states the first of his two grounds thus: "On the grounds, therefore, that this particular charge of heresy was not preferred before the Commissioners on whose report the subsequent proceedings are founded, and that it was not mentioned in the Letters of Request or in the Decree or Citation, I should, having regard to the law and practice of this Court and the authorities to which I have adverted, be of opinion that the Articles must be reformed by striking out the portions which relate to it." The reason for his arriving at that conclusion appears to be this. Mr. *Bennett* had published a certain number of Pamphlets or Works, and the first step taken under the Statute was that of issuing a Commission to inquire, whether or not proceedings should be had against him, on account of positions maintained in those publications, this Commission being issued by the Bishop pursuant to the Statute. What the Commissioners were directed to inquire into was this: they were to make inquiry as to the grounds of a certain charge made by the Promoter of this proceeding, Mr. *Sheppard*, against Mr. *Bennett*, the charge being, that he (Mr. *Bennett*) "had, within the

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Diocese of *London*, committed an offence against the Laws Ecclesiastical of this realm,' by having caused to be printed and published within the said Diocese certain Works, in which he advisedly maintains or affirms doctrine contrary or repugnant to the Articles and Formularies of the United Church of *England* and *Ireland*, the said works being entitled respectively"—and then the titles are set out; after which are these words, " and containing the following among other statements, in respect of which the said charge has been made, that is to say; " and then the Commission proceeds to set forth a number of passages selected from those various writings, all following this heading, " containing the following among other statements."

Upon the finding of the Commissioners that there was ground for further proceeding, Letters of Request were forwarded by the Bishop to the Archbishop, requesting that a Citation or Decree should be issued under the seal of the Court of Arches, citing Mr. *Bennett* " to appear at a certain time and place therein to be specified, and answer to certain Articles, heads, positions, or interrogatories touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for having offended against the Laws Ecclesiastical, by having, within two years last past, caused to be printed and published, within the Diocese of *London*, certain works, in which he advisedly maintains or affirms doctrine directly contrary or repugnant to the Articles and Formularies of the United Church of *England* and *Ireland*, the said Works being entitled respectively;" and then all the titles are given, and only the titles of these works; and then the Letters state that the Articles are " to be administered to him, the said *William James Early Bennett*, at the voluntary promotion of the said *Thomas Byard Sheppard*;" and the Archbishop is required finally " to hear and determine the said cause according to the law and practice of the Court."

Upon that there follows the Decree or Citation, which, reciting the Commission and reciting the Letters of Request, proceeds to cite the Respondent in the following manner, namely, that he is to answer the charge, the charge being that he has committed an offence by publishing these works, the title of which are again set forth; and then in the Decree or Citation are also added these words,

"containing the following among other statements, in respect of which the said charge has been made, that is to say," then giving the whole of the various passages which were cited from the books in the original proceedings before the Commission.

Now, to proceed by steps in this matter: with reference to the Commission, their Lordships do not think it necessary to dwell at any length upon the proceeding as set forth in the Commission, for this simple reason, the Commission is merely a preparatory step taken by those whom the Bishop is, if he think fit, to call together to consult and advise with him as to whether or not a sufficient *primâ facie* case is made out, so as to render it desirable and fitting that he should have the case further inquired into before a regular Tribunal; and when the Commission sitting for that purpose have once found, as this Commission did find, that there is reason for proceeding, they have performed their duty, and, after that duty is performed, the Bishop, acting upon their suggestion and advice, proceeds by Letters of Request to confer jurisdiction upon the Superior Court to determine the matter, not by way of appeal, but in the first instance, which he by the Statute is authorized to do.

When, therefore, that step has been once passed, it seems to their Lordships unnecessary to consider any further, what was or was not before the Commission, although in this case nothing will be found to depend upon it, because the subsequent proceedings seem to have taken their regular course. But there may be other cases in which such circumstances will not occur; therefore, it is desirable that we should at once state what appear to their Lordships to be the proper function and course of proceeding of the Commission, namely, simply advising the Bishop on the matters which are alleged before him, leaving the Bishop to take his own course after that has been done, and to bring the matter in such form as he thinks fit by Letters of Request before the Court of Arches.

The Bishop, then, by the Letters of Request, founds jurisdiction in the Arches Court, which could not proceed, except upon such Letters of Request, until the Bishop had heard and disposed of the matter in his own Court; and, having so founded the jurisdiction, the Letters also set forth that upon which he desires a Citation to be issued to the Clergyman who is alleged to have offended.

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In this Citation their Lordships are quite clear, that all that is necessary to be done is to state generically the offence with which the Clerk is charged. He must be told undoubtedly what charge it is that is brought against him. But that may be done in terms reasonably precise without going into any minute degree of detail —so that, in short, he should not be tried on a charge of heresy when perhaps it may be some other charge which is to be alleged in the Articles. He must have the offence generically stated in such terms as to lead him to know what the matter is which he is called upon to answer, but the detail of that charge will be made in the Articles to be exhibited, for the purpose of giving him full information. He is expressly told in the Citation that Articles will be exhibited against him. To those Articles he will be called upon to put in his answer; and, as regards the charge itself, it is not necessary that it should enter into the minute details and particulars which it is essential that the Articles afterwards should dwell upon.

Therefore, in this case the Citation seems to have been quite sufficient for the purpose for which it was issued, namely, informing Mr. *Bennett* that he was charged with having, in certain publications of his, which were enumerated, offended by setting forth Doctrines which were contrary to the Doctrines held by the Church of *England;* and it proceeded in a manner which is not at all necessary, as it appears to their Lordships, that it should do, to set forth fully certain passages from those Works which he is so alleged to have published. But their Lordships do not agree with the learned Judge that those passages are to be taken as forming part of what is technically called the "*præsertim,*" or the special subject-matter with which he is charged. The special subject-matter with which he is charged is quite sufficiently set forth for the purpose for which the Citation is issued, as "the having published these Books," in which are contained the passages that are alleged afterward in the Articles to constitute the offence.

The passages, or extracts, are set forth in a manner which no doubt left him no reason to complain, because they state very specially and particularly (more so, their Lordships think, than is absolutely necessary) the particular heads under which he was supposed to have offended. That might have been left to the

Articles. They were, however, set forth in the original Citation. Without them he would have no reason to complain whatever, because he would know for what purpose he had been cited before the Court, and he would know in what Books the charges would be found. He would also know that, in due course of time, Articles would be exhibited, bringing before him specifically the nature of those charges.

So far, therefore, we should have thought there would be no ground for saying that the Promoter should not be at liberty to introduce a charge against Mr. *Bennett* of impugning the 29th Article, by setting forth that the wicked partake of the Lord's Body and Blood in receiving the Holy Communion, if it had been only on this ground that the passages from the publications supposed to contain that opinion had not been set forth in the Citation, provided the passages were to be found in the Books, and were afterwards minutely and specifically to be set forth in the Articles which the Respondent would have, ultimately, to answer.

The sole point remaining, therefore, is to see, whether or not the Articles, as set forth, are supported by passages from the Works in question, the publishing of which is charged as an offence. Now, that, no doubt, is a more grave and important part of the case, and upon this, which is the second ground of objection to the Articles which the learned Judge has directed to be reformed, their Lordships have come to the conclusion, that they ought to agree with him in his decision. He says this: "Assuming, however, for the sake of argument, that these objections do not apply to the present case, there remains one of even a graver character to be stated. This is a highly penal proceeding against the Defendant. It is a criminal suit for the promulgation of heresy. The particular charge is not on account of a heresy distinctly stated or uttered in any Sermon, or public act of preaching, or statement connected with the discharge of his duties as Incumbent of the parish committed to his charge. It is a heresy alleged to be contained in an Essay or Review upon Ecclesiastical events in the Church since the year 1833. It is to be extracted from what purports to be an historical statement of a Trial against another Clergyman as long ago as the year 1856. The author narrates that Archdeacon *Denison* was condemned by the then Archbishop

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of *Canterbury*, for teaching the doctrine of the Real Presence (not a quite accurate statement, I may observe in passing), that the Sentence was reversed, that a Protest against the Archbishop's Sentence was signed by seventeen Priests; of these the Defendant is said to be one. It is contended, that by this reference to the protest, which is in a Work not mentioned in the Citation, the Defendant has made himself responsible in this suit, be it observed, for what is contained in that protest."

Now, without adopting every word of what is said by the learned Judge in his reasoning upon the subject, in principle it appears to their Lordships to be correct to say, that the Promoter must find, in the first instance, as the foundation of the Articles alleging that erroneous doctrines has been promulgated, something contained in the publication which he alleges the accused to have issued forth, something which lays the ground of the special charge which he puts forth in his Articles; and upon that part of the case it may be well to refer to what has been said by the Lord Chancellor in delivering the opinion of the Judicial Committee in the case of the 'Essays and Reviews,' the case of *Williams* v. *The Bishop of Salisbury* (1), and the mode in which he puts the necessity of stating, in the Articles of charge, the passages upon which the Promoter intends to rely as justifying the Articles. I am citing from 2 Moore's P. C. Cases (N.S.) p. 423. These prosecutions are in the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation. The Articles of charge must distinctly state the opinions which the Clerk has advisedly maintained, and set forth the passages in which those opinions are stated; and, further, the Articles must specify the doctrines of the Church which such opinions or teaching of the Clerk are alleged to contravene, and the particular Articles of Religion, or portions of the Formularies, which contain such doctrines. The Accuser is, for the purpose of the charge, confined to the passages which are included and set out in the Articles as the matter of the accusation; but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the Accuser."

(1) 2 Moore's P. C. Cases (N.S.) 375. 10 Jur N.S. 406

(2) 10 Jur N.S. 410

Then what has to be done is this: there must be set forth in the Articles, as is set forth here in the 12th, in the 18th, and the 25th Articles, what it is that is charged against the Clerk, and what is the Article of Religion or portion of the Formularies of the Church containing doctrine which the Clerk is alleged to have impugned. Well, that has been complied with properly in these Articles so far, by stating that he has impugned the doctrine contained in the 29th Article of our Thirty-nine Articles, and that he has impugned it, because he has stated that the wicked receive the Body and Blood of our Lord in the Holy Communion. So far the Articles perform their duty, but then we have to see, whether there are specified the passages in which he, the Clerk, is alleged to have stated an opinion contraverting that Article. Feeling that to be required, the Promoters refer, in the 12th Article, to the 5th previous Article, as setting forth the passages; in the 18th Article they refer to the 6th Article, and in the 25th Article they refer to the 7th previous Article. To the 5th, 6th, and 7th Articles, therefore, we must look to see what are the passages in the writings of Mr. *Bennett* in which the erroneous doctrine is said to be contained.

The only passage which has been pointed out to their Lordships' attention in the 5th Article is this: it is a very long Article, and there are numerous passages cited in it, but the only passage bearing upon this point, that is cited, is contained in the latter part of that Article. Having spoken a good deal about the Real Presence in the previous part, Mr. *Bennett* proceeds to say:—Among others, Archdeacon *Denison* "taught the doctrine of the Real Presence to his Candidates for ordination; and thence arose the extraordinary trial of the faith which terminated in an ignominious conclusion at *Bath*." We observe, therefore, that he refers entirely to Archdeacon *Denison's* teaching the doctrine of the Real Presence, a doctrine of an entirely different character—whatever be the view of any persons with reference to its being a correct or incorrect doctrine—from that doctrine which is struck at by the 29th of the Thirty-nine Articles, as is evidenced (a fact, as we have already pointed out during the argument) by the very framers of the Articles themselves. The one doctrine may be held, as the learned Judge in the Court below says, without the other doctrine being held by

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the same person who holds the first. Therefore, we find nothing relating to the 29th Article there.

Then, having thus referred to what Archdeacon *Denison* taught as to the doctrine of the Real Presence, Mr. *Bennett* proceeds to say:—"The doctrine (which, of course, is the same doctrine) was condemned by the Archbishop of *Canterbury* in his own person, but the judgment was resisted. The Church was harassed by an unworthy and undignified contest, which ended in nothing, while several Priests of determined mind entered their solemn protest" (and then, by innuendo, the framer of the Article says, "thereby meaning and intending a certain protest signed by, amongst others, you, the said *William James Early Bennett*, and which protest is hereinafter, in this Article, set forth")—"against the whole proceeding of the Archbishop, reiterating the doctrine and challenging a new verdict for the truth. This protest was signed by seventeen Priests, two of whom were Dr. *Pusey* and Mr. *Keble*, and appealed in 'the first instance, to a free and lawful Synod of the Bishops of the Province of *Canterbury*, and then, if need be, to a free and lawful Synod of all the Churches of our Communion, when such, by God's mercy, may be had.' After this, nothing further was heard of the silly trial of *Ditcher* v. *Denison*. It died a natural death. But what became of the doctrine?"—the doctrine, clearly the doctrine of the Real Presence. "From 1853, when it passed the judgment of the Heads of Houses in *Oxford*, to 1867, when at length no one is inclined to resist it, it has grown and multiplied with wonderful rapidity, according to the saying, '*Magna est veritas, et prævalebit.*' In 1857, he whom now it has pleased God to take to his rest, the saintly *John Keble*, set forth the seal and conclusion of the whole, in his own beautiful and loving way, in a work entitled 'Eucharistic Adoration.' From that moment the whole question has been suffered to advance in peace."

In those words it is impossible to find a single sentence affecting the 29th Article. As their Lordships have stated before, the doctrine of the Real Presence is not a doctrine in contravention of that Article, whether it be a doctrine in contravention of any other or not.

Then the only way in which it is sought to make out that the

doctrine of the 29th Article has been contravened by inference by Mr. *Bennett* is this: the Promoter says there is a reference to the protest against the Archbishop of *Canterbury's* judgment in *Ditcher* v. *Denison*. He says, further, that "this protest was signed by you, the accused, Mr. *Bennett*;" and, therefore, you have so referred to this protest as to justify the Promoter in saying, that you have, within two years, as charged by the second Article, committed the offence of impugning the 29th Article. The protest itself was signed far more than two years ago, and it appears to us, therefore, that it is exactly the same, whether the protest was signed by Mr. *Bennett* himself or by any other person, and that the protest is in exactly the same position as the Book published by Mr. *Keble*, or any other Work that has been referred to by Mr. *Bennett* in his own publications. The Promoter cannot rely upon the protest itself as being that on which he can found a ground for charging Mr. *Bennett*, because, of course, Mr. *Bennett* cannot be charged upon that which he signed so many years ago; but it is requisite to find a recognition of that protest—not merely a reference to it, but a recognition of that protest, and an adoption of it *in toto*, or an adoption of it so far as it specially teaches any erroneous doctrine. Of course, if Mr. *Bennett* had set out the protest, and said, "To this, and every word of it, I agree," or if he had set out the particular part of the protest which, on reading it, you would say does deal in a manner apparently, at all events, inconsistent with the 29th Article, and said, "As to this portion I agree," or even, possibly, if he had said (I do not wish to say more, as we are upon a hypothetical case), "There is nothing in this protest from beginning to end, which I signed many years ago, from which I see any reason to depart;" any such mode of reference as that might have raised a very different question, but the only reference we find to the protest is a qualified one, a reference entirely dealing with the doctrine of the Real Presence; and it is impossible, as it seems to their Lordships, to say that, upon that ground, the Promoter is entitled to import into this charge a passage which is not to be found in any one of the Books which Mr. *Bennett* has published, but in a document of a totally different character, one proceeding from sixteen other persons (it is said to have proceeded from him too), and which contains a variety of statements one of which is selected to fix a charge upon

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Mr. *Bennett*, but as to which Mr. *Bennett* himself is totally silent in the Books before the Court.

It appears to us, therefore, as far as the 12th Article is concerned, which is founded solely upon this 5th Article, that it does not conform to the rule laid down in the Essays and Reviews Case (*Williams* v. *The Bishop of Salisbury*) (1), namely, of specifying the passages in which the Clerk is said to have offended in such a manner as to bring him within the cognizance of the Court at the present period, namely, a passage or passages written and published by the Clerk in those Books which he is alleged to have written and published within the last two years.

We must now go to the 6th Article, upon which the 18th Article is founded. In that 6th Article there is a somewhat nearer approach to a recognition, but still very far from being an actual adoption,—a somewhat nearer approach, say, to a recognition of the alleged erroneous doctrine by Mr. *Bennett*, in consequence of the peculiar wording of his reference to a Work published, not by himself, but by Dr. *Pusey*, some considerable time since.

The passage is thus stated:—"Then followed, in 1855, your voluminous Work." Then the framer of the Article says, "meaning thereby the Work of the Rev. *E. B. Pusey*, entitled, 'The Doctrine of the Real Presence as contained in the Fathers from the death of S. John the Evangelist to the Fourth General Council vindicated, in Notes on a Sermon, 'The Presence of Christ in the Holy Eucharist,' preached A.D. 1853, before the University of *Oxford*.'" And it goes on, "being principally a *catena* of the Fathers, to prove the catholicity of the doctrine which you advocated; and then followed again, in 1857, in order to bring the doctrine fully home, and apply it to the English Church, another Volume, concerning which there could be no mistake, for it bore this remarkable title, 'The Real Presence of the Body and Blood of Our Lord Jesus Christ the Doctrine of the English Church, with a Vindication of the Reception by the Wicked, and of the Adoration of Our Lord Jesus Christ truly Present.' And then followed upon this the Work of our most dearly lamented friend, *John Keble*, entitled, 'Eucharistical Adoration,' in which is clearly set forth that very worship which we are now endeavouring to follow, that very adoration which we now

(1) 2 Moore's P. C. Cases (N.S.) 375.

teach our people to use as due and right to give to the 'Presence of our Blessed Lord upon our Altars.'"

The first remark to be made on that quotation is this, that it is quite clear that Mr. *Bennett* is not adverting to the doctrine of the reception by the wicked, because if that had been so, and if he was referring to Dr. *Pusey's* Pamphlet as indicating the truth of that peculiar error (if such it be), then the Promoter would have found the passage in Mr. *Bennett's* own Work. He would have set forth the passage in which Mr. *Bennett*, speaking of that doctrine, cites Dr. *Pusey* with approbation as supporting him in that view. What is quite clear from the ending of the passage is this, that he is here supporting the doctrine of the Adoration and the doctrine of the Real Presence. Those are subjects on which have been framed other Articles, as to which he is called upon by the learned Judge in the Court below to answer. The Articles exist upon both those heads, and those Articles he will have to answer. Dealing with that, he says, in effect, that the catholicity of the doctrine advocated by Dr. *Pusey* has been fully brought home to the English Church. Then he gives the title of the work, which involves three subjects, the Real Presence, the Reception by the Wicked, and the Adoration of our Lord as being Present. These are all totally distinct heads of doctrine. Then he says, to shew to which he is referring, "And then followed upon this the Work of our most dearly lamented friend *John Keble*, entitled, 'Eucharistical Adoration,' in which is clearly set forth that very worship which we are now endeavouring to follow, that very adoration which we now teach our people to use," and so on.

It is clear, therefore, what are the particular points, as clear as the previous case to which he is calling attention, namely, the Real Presence and the Adoration; and it is too much to say that, because a title embodies three subjects, and the Respondent speaks approvingly of the Work, and speaks of it as establishing the doctrine as to two of those subjects, therefore, he is to be held as having expressed approbation as to the third doctrine contained in the title-page. Although he intimates that he is glad to receive the Book, because there can be no mistake on the particular points which he wishes to hold forth to the public as being the right and proper doctrine, there is no ground for coming to the conclusion

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that, because he thus approves, as he does clearly approve, of the work as supporting these two doctrines, therefore, *ex necessitate*, he must be held to approve of the third doctrine, and that, consequently, such Work of Dr. *Pusey* is to be held forth as a ground for supporting the 18th Article. In other words, it would be to make him answerable for Dr. *Pusey*'s doctrine without his having distinctly and avowedly in words adopted it.

In the 7th Article, which is referred to in the 25th, and, indeed, both in the 6th and 7th Articles, there is another passage, on which it is alleged, that the learned Judge in the Court below ought to have admitted the 25th Article. I am reading from the 6th Article, where the words are,—"That the said propositions so hereinbefore in this Article referred to as having been maintained by the said Archdeacon *Denison* are certain propositions maintained by him in certain Works or writings, for which he was cited to appear before the then Archbishop of *Canterbury*, under 3 & 4 Vict. c. 86, at a Court held by his Grace in the City of *Bath*, in the year 1856, and are as follows:—'1. That the Body and Blood of Christ are really present in the Consecrated Bread and Wine. 2. That the Body and Blood of Christ are really present in the Consecrated Bread and Wine after a manner not material, or, as it is said 'corporal,' but immaterial and spiritual. 3. That the Body and Blood of Christ being really present after an immaterial and spiritual manner in the Consecrated Bread and Wine are therein and thereby given to all, and are received by all who come to the Lord's Table.'"

Now, Mr. *Bennett* has not given his explicit approbation to those three propositions which are cited by the Pleader, and only cited by the Pleader, as being the propositions which were in question in Archdeacon *Denison's* case; but all he has said is this: "We have the celebrated legal case of Archdeacon *Denison*. Archdeacon *Denison* maintained, in various propositions, the Real Objective Presence of our Blessed Lord in the Eucharist. His doctrine was impugned, and he was cited before the Church Courts. The Archbishop of *Canterbury*, *in propria personâ*, came to *Bath* to try the question. It broke down." There, again, he is only saying exactly what he said before. He says, that the Archdeacon maintained the doctrine of the Real Presence, and the

Pleader puts it thus: "Besides that, there were several other doctrines, and because there were I have a right to hold Mr. *Bennett* answerable as having set forth now within these two years passages in which he impugns the 29th Article of the Church of *England*."

The 25th Article, which refers to the 7th, is in the same words as the 18th, and subject to exactly the same remarks. It refers to the 7th Article, and the passage is found again about Mr. *Keble* and the Eucharistic Adoration. And towards the conclusion of the Article are the words: "Archdeacon *Denison* maintained, in various propositions, the Real Objective Presence of our Blessed Lord in the Eucharist. His doctrine was impugned, and he was cited before the Church Courts." All that has been referred to before, and also the passage about the Archbishop of *Canterbury*, *in propria personâ*, going down to try the question. Then it goes on: "Nothing could be shewn to prove that it was a false doctrine, or to dislodge the Archdeacon from the position which he then maintained, and still does maintain, and maintaining, is still Archdeacon of *Taunton*. Is it fair, then, to ignore this matter of history—these facts known universally; and, when they thus stand out unassailable, to treat them as though they never had been? Is it fair, when the doctrines have thus been proved over and over again to be true, still to recur to them, and pronounce them false, and to say that ceremonies, because they symbolize them, and draw with them a reverential worship attached to them, make us idolatrous?"

Then the Pleader sets out the propositions, and he wishes to fasten his logic upon Mr. *Bennett* as being Mr. *Bennett's* logic, and to treat the propositions of Archdeacon *Denison* as being propositions adhered to by Mr. *Bennett*, upon which he is entitled to reply as impugning, on the part of Mr. *Bennett*, the 29th Article.

Now, I confess, having gone through those passages, it seems to me (and their Lordships concur) that the Articles which are to specify the doctrines impugned must specify the opinions which the Clerk has advisedly maintained, and they must set forth the passages in which those opinions are maintained. It is not a compliance with those requisites to set forth other passages in works which he has approved of generally, because those works contain

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passages which that Clerk has not by his own publication supported, maintained, or accepted in their totality and generality. No man certainly would be safe if it were to be held that, because approbation is expressed by him of a particular Writer upon topics such as these, where the shades of opinion of all men are so minute and so very delicate and refined, according to the turn of each person's mind, he were to be made answerable for opinions as being his which are not his, but are contained in some Work of the general character of which he has expressed his approbation.

It appears, therefore, to their Lordships that the learned Judge was justified on that ground in directing the Articles to be reformed in the particulars which he has mentioned, because the Articles do not set forth the passages from Mr. *Bennett's* Work in which Mr. *Bennett* maintains any doctrine impugning the 29th Article.

As to what may subsequently take place in the Court below, it is not for their Lordships to pronounce an opinion. They have merely to deal with the appeal as it comes before them. They have simply to say, whether the Judge was right or not in directing the Articles to be reformed to the extent to which he has directed them to be reformed.

Therefore, being of the same opinion as the learned Judge, their Lordships will humbly recommend to Her Majesty that the appeal be dismissed; and, as Mr. *Bennett* has not appeared, there will be nothing said about costs.

Proctors for the Appellant: *Moore & Currey.*

THOMAS BYARD SHEPPARD . . . . . APPELLANT; J. C.*

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THE REV. W. J. EARLY BENNETT, CLERK RESPONDENT. *Nov.* 28, 29, 30; *Dec.* 1, 2.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

SECOND APPEAL.

Charges against a Clergyman for maintaining and publishing Doctrines contrary to the Articles and Formularies of the Church, regarding the Actual Presence, the Sacrifice at the Altar, and the Adoration of the Sacrament, held not sufficiently proved to justify a Criminal and Penal proceeding—The true Doctrines of the Church on these points stated.

Articles of Charge against a Clergyman for affirming and maintaining in works printed and published by him:

First, that in the Sacrament of the Lord's Supper there is an actual Presence of the true Body and Blood of our Lord in the consecrated Bread and Wine, by virtue of, and upon the consecration, without, or external to the Communicant, irrespective of the faith and worthiness of the Communicant, and separately from the act of reception by the Communicant.

Second, that the Communion Table is an Altar of Sacrifice, at which the Priest appears in a sacerdotal position at the celebration of the Holy Communion, and that at such celebration there is a great sacrifice or offering of our Lord by the ministering Priest, in which the mediation of our Lord ascends from the Altar to plead for the sins of men; and

Third, that adoration is due to Christ present upon the Altar, or Communion Table, of Churches, in the Sacrament, under the form of Bread and Wine, on the ground that under their veil is the Body and Blood of our Lord.

Upon examination of the passages extracted from the publications, in which it was alleged these doctrines were maintained, the Judicial Committee were of opinion, that though the language used was both rash and inconsiderate, yet that the passages extracted did not, in terms, sufficiently contradict the Articles and Formularies of the Church as to render the Clerk proceeded against subject to a criminal and penal proceeding; but having reference to the doctrine to which the above three charges related as contained in the 4th, 28th, 29th, and 31st Articles of Religion, and the Church Catechism, and the language used by the Defendant: the Judicial Committee declared

I. That the Church of *England*, in her Articles, and Formularies, and

* *Present*:—THE LORD CHANCELLOR (LORD HATHERLEY), THE ARCHBISHOP OF YORK (DR. THOMSON), THE BISHOP OF LONDON (DR. JACKSON), LORD ROMILLY (MASTER OF THE ROLLS), SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, BART., THE LORD JUSTICE JAMES, THE LORD JUSTICE MELLISH, MR. MOUNTAGUE BERNARD, D.C.L., and SIR MONTAGUE EDWARD SMITH.

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Catechism, holds and teaches affirmatively, that in the Lord's Supper the Body and Blood of Christ are given to, taken, and received by the faithful Communicant. She implies, therefore, to that extent, a presence of Christ in the Ordinance to the soul of the worthy Recipient. As to the mode of this Presence she affirms nothing except that "the Body of Christ is given, taken, and eaten, in the Supper, only after an heavenly and spiritual manner," and that "the mean whereby the Body of Christ is received and eaten in the Supper is faith" (Article XXVIII.). Any other Presence than this—any Presence which is not a Presence to the soul of the faithful Receiver—the Church does not by her Articles or Formularies affirm, or require her Ministers to accept; and consequently the maintaining by a Clergyman of a "real, actual, objective" Presence of our Lord in the Sacrament of the Holy Communion "upon the Altar, under the form of Bread and Wine," was not, in the affirmance, a doctrine so contradictory or repugnant to the Articles and Formularies of the Church as to be properly made the ground of a criminal charge against him, and that a Clergyman cannot be condemned for maintaining that the change, in 1662, of the word "corporal," for the words "real and essential," in the Declaration of Kneeling, appended to the Service of the Holy Communion, was an intentional substitution, implying that there may be a real or essential Presence, as distinguished from a corporal Presence, if he does not, in terms, allege a corporal Presence of the natural Body of Christ in the Elements, or that the Body of Christ is present in a "corporal" or "natural" manner.

II. That it having been decided in *Westerton* v. *Liddell* (1) that the change of the view taken of the Sacrament of the Lord's Supper, "as shewn by comparison of the present Communion Office with that of the first Prayer Book of *Edward* VI., and the Canon of the Mass in the *Sarum* Missal," naturally called for a corresponding change in the Altar; that it was no longer to be an Altar of Sacrifice, but merely a Table at which the Communicants were to partake of the Lord's Supper; and that the 31st Article of Religion, after laying down the proposition (which is adopted also in the Prayer of Consecration), that "The Offering of Christ once made is that perfect redemption, propitiation, and satisfaction, for all the sins of the whole world, both original and actual," and that "there is none other satisfaction for sin, but that alone," proceeds on the strength of these propositions to say, that "the Sacrifices of Masses, in which it was commonly said, that the Priest did offer Christ for the quick and the dead, to have remission of pain or guilt, were blasphemous fables and dangerous deceits:"

It is not lawful for a Clergyman to contradict, expressly or by inference, either the proposition which forms the first part of the 31st Article, or any proposition plainly deducible from the condemnation of propitiatory masses, which forms the second part of it, and is stated as a corollary to the first:

Neither is it lawful for a Clergyman to teach that the Sacrifice, or offering of Christ upon the Cross, or the redemption, propitiation, or satisfaction, wrought by it, is or can be repeated in the Ordinance of the Lord's Supper; nor

(1) Special Report by E. F. Moore, 1857.

that in the Ordinance of the Lord's Supper there is, or can be, any Sacrifice or Offering of Christ which is efficacious, in the sense in which Christ's death is efficacious, to procure the remission of the guilt or punishment of sins.

The word "Sacrifice" has been applied to the Lord's Supper by Divines of eminence, not in the sense of a true propitiatory or atoning Sacrifice, effectual as a satisfaction for sin, but of a rite which calls to remembrance and represents before God that one true Sacrifice.

III. That the doctrine that adoration is due to the Consecrated Elements is contrary to law, and has been condemned: *Martin* v. *Mackonochie* (1). The Church of *England* has forbidden all acts of adoration to the Sacrament, understanding by that the Consecrated Elements. She has been careful to exclude any act of adoration on the part of the Minister, at or after the consecration of the Elements, and to explain the posture of kneeling prescribed by the Rubric. The 28th Article lays down, that "the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." In the 25th Article it is affirmed, that "the Sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them." In the absence of a charge of any outward act of adoration, a general charge, *held*, in the circumstances, not sufficient to support a penal proceeding.

The successive alterations and omissions in the Book of Common Prayer, by which words or passages, inculcating particular doctrines, or assuming a belief in them, have been struck out, are evidence that the Church has ceased to affirm those doctrines; but the effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, and not that it becomes unlawful to maintain them.

Though it has been the practice of the Arches Court, on the remission of Articles directed on appeal to be reformed as to a particular charge, for the Judge himself to reform the Articles by striking out such parts of the Articles as he conceives to be within the original Decree appealed from and confirmed, notwithstanding objections made by the Promoter of the cause; such practices, as tending to create delay, if not a miscarriage of justice, if the Judge should erroneously strike out parts not affected by the Order in Council, ought to be discontinued; and before an appeal from any Decree directing the reformation of Articles is perfected, the actual reformation which appears to the Judge to be required should be made by him and appear on the face of the Decree, that the very passages directed to be omitted may be brought under the judgment of the Court of appeal.

THIS appeal was brought from the final Sentence or Decree of the Dean of the Arches Court of *Canterbury*, made in the cause, pronounced on the 23rd of July, 1870, and also from two Interlocutory Orders made by the same Judge in the cause.

The cause was instituted in the Arches Court by virtue of

(1) Law Rep. 2 P. C. 365.

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Letters of Request from the late Bishop of *Bath* and *Wells*, under the Statute, 3 & 4 Vict. c. 86.

No appearance was given to the Citation, and in default Articles were filed and Counsel heard on the admission thereof, when the Judge directed the Articles to be reformed by omitting all such parts as charged the Respondent with contravening the 29th Article of Religion, entitled "Of the Wicked which eat not the Body of Christ in the use of the Lord's Supper." From this Decree or Order an appeal was made to Her Majesty in Council. The appeal came before the Judicial Committee of the Privy Council on the 26th of March, 1870 (1), and the Lords of the Committee, having heard Counsel on behalf of the Appellant, agreed to report to Her Majesty their opinion against the appeal, that the Decree or Order appealed from ought to be affirmed, and the cause remitted, with all its incidents, to the Judge of the Court from which the same was appealed.

The cause was accordingly remitted to the Arches Court of *Canterbury*, and on the 3rd of June, 1870, in default of appearance on behalf of the Respondent, the Judge, having heard Counsel on behalf of the Appellant, himself reformed the Articles and admitted the same as so reformed, notwithstanding that the Counsel for the Promoter objected to the reformation of the Articles so made by the Judge, as being at variance with and exceeding the reformation directed by the Order in Council confirming the Report of the Judicial Committee of the 26th of March, 1870.

On the 16th of June, 1870, the cause came on for hearing, and an application was made by Counsel that the passages in the 5th, 6th, 7th, and 32nd Articles, which had been struck out by the Judge in his reformation of the Articles, might be reinstated. The Judge, however, made no further order thereon, and the hearing was continued on the 17th and 18th days of June.

Evidence of the authorship and due publication of the works as charged in the Articles was given, and on the 23rd of July, 1870, the Judge of the Arches Court (The Right Hon. Sir *Robert Phillimore*), by his Interlocutory Decree, pronounced that the Appellant had failed in sufficiently proving the Articles, and dismissed the Respondent from the suit (2).

(1) *Ante*, p. 350. (2) Law Rep. 3 A. & E. pp. 167–180.

The Articles admitted and reformed, and upon which the sentence appealed from was founded, charged, in substance, as follows:—

I. That by the Laws, Statutes, Constitutions, and Canons Ecclesiastical of this Realm, Clerks in Holy Orders are required in their preaching, teaching, writings, or publications to adhere to the doctrine set forth in the Thirty-nine Articles and in the Book of Common Prayer.

II. That the Respondent was a Clerk in Holy Orders and Vicar of *Frome*.

III. That the Respondent had, within two years last past, printed and published within the Diocese of *London*, in a Book entitled "The Church and the World," the Essay entitled "Some Results of the Tractarian movement of 1833."

IV. That the Respondent had, within two years past, printed and published within the Diocese of *London*, a Book entitled "A Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*, D.D., Regius Professor of Hebrew and Canon of *Christ Church, Oxford*." Second and Third Editions.

V. That in the Essay, entitled "Some Results of the Tractarian movement of 1833," Second Edition, were contained certain passages in the Article of Charge set forth, and which were: First, those passages set out in the original Commission of Inquiry, and recited in the Letters of Request and Citation (1), and which passages advocated the doctrine of the Real Presence of Christ in the Eucharist, of a sacrifice therein offered by the Priest, and of adoration being due, by reason of the Real Presence: and, secondly, passages not set out in the Commission, Letters of Request, or Citation, and which latter passages spoke of Archdeacon *Denison* having taught the doctrine of the Real Presence, of his having been condemned by the Archbishop of *Canterbury*, in a trial at *Bath*, for doing so, and of "several Priests of determined mind (among whom the Respondent was one) having entered their 'solemn protest' against the whole proceeding of the Archbishop, reiterating the doctrine and challenging a new verdict for the

(1) The passages extracted from the Respondent's Works, containing the Doctrines, &c., for which he was proceeded against, will be found fully set out, with the Articles of Charge, in the Report of the case in the Arches Court, Law Rep. 3 A. & E. pp. 167–177: those upon which their Lordships' decision turned will be found in their judgment.

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truth." The Article alleged and charged that the Respondent meant by the "solemn protest," the "protest against the *Bath* judgment," which was set out at length in the original Article; the whole of which passages, with the protest thus specially set out, were reformed and struck out by the Dean of the Arches, against whose decision the appeal now was. The Article, moreover, charged that the Respondent's Essay contained passages, therein set forth, which maintained a declaration of belief in the Real Presence, and a recommendation of Adoration by reason thereof.

VI. That the before mentioned Essay, in the same second edition, contained further passages, set out in that Article of Charge, and previously in the Commission, Letters of Request, and Citation, advocating the teaching of the doctrine of the Real Presence and the use of ceremonial observances, of the use of Vestments, lighted Candles, and incense, and declaring the true doctrine of the Eucharist to be threefold: (1) The Real objective Presence of our Blessed Lord; (2) The Sacrifice offered by the Priest; and (3) The Adoration due to the Presence of Our Blessed Lord in the Holy Eucharist, with extracts from a Work by Dr. *Pusey*, entitled "The Doctrine of the Real Presence, as contained in the Fathers, from the death of S. *John* the Evangelist to the Fourth General Council, indicated in Notes on a Sermon, 'The Presence of Christ in the Holy Eucharist, preached A.D. 1853, before the University of *Oxford*,'" all which last-mentioned extracts were disallowed and struck out by the learned Judge of the Arches, on the reformation of the Articles.

VII. That the third edition of the same Book "A Plea for Toleration," &c., contained, among others, the following passages at pages 3 and 4 of the Preface: "I, therefore, send forth this Third Edition with as little comment as possible, and in precisely the same language as that which was used in the first and second editions, save and except the two passages referred to, omitting also the postscript, which, by the events in the Church which have occurred in the interval, have now no bearing on the subject. The Reader will observe that in the two first editions, at page 3, the words were: 'The real actual and visible Presence of Our Lord upon the Altars of our Churches.' In the present edition he will find, at page 2, the following words substituted: 'The real and

actual Presence of Our Lord, under the form of Bread and Wine upon the Altars of our Churches." He will also observe, that at page 14 in the former editions the words were: "Who myself adore, and teach the people to adore, the Consecrated Elements, believing Christ to be in them, believing that under their veil is the sacred Body and Blood of my Lord and Saviour Jesus Christ.' He will now find the following words substituted: 'Who myself adore, and teach the people to adore, Christ present in the Sacrament, under the form of Bread and Wine, believing that under their veil is the sacred Body and Blood of my Lord and Saviour Jesus Christ.' My meaning and that which passed through my mind in writing the original passages was precisely the same as that which is now conveyed in the words substituted, but as the original words were liable to a different construction from that in which I used them, I, therefore, most willingly in this edition adopt another *formula* to express my meaning. The *formula* now adopted, and which, without any doubt, will convey the doctrine of the Real Presence, as the Church would teach it, has been suggested to me by him whose name stands at the head of this pamphlet," (the said Rev. *E. B. Pusey*, D.D.,) "one to whom the whole Church would implicitly bow, and all revere. I have no hesitation in adopting his words as my own fully and completely, and on this basis am ready, with him, patiently to contend for the faith once delivered to the Saints, and if need gladly to suffer." That the preface to this third edition, as well as the Book itself, contained further passages in the Article set out, in which the same doctrine, as previously stated, was reiterated, affirmed, and adopted by the Respondent.

VIII. That in the passages set forth in the 5th Article the Respondent had maintained the doctrine "that in the Sacrament of the Lord's Supper there is an actual presence of the Body and Blood of our Lord in the consecrated Bread and Wine."

IX. That in the same passages the Respondent had maintained and affirmed "that there is an actual presence of the true Body and Blood of our Lord in the Sacramental Bread and Wine without or external to the Communicant, by virtue of, upon, and after the consecration of the same, irrespectively of the faith and worthiness of the Communicant, so as to be received by all Communicants irrespectively of their faith and worthiness."

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X. That in the same passages, so set out, the Respondent maintained "that there is an actual presence of the true Body and Blood of our Lord in the Consecrated Bread and Wine, without or external to the Communicant, prior to and separate from the act of reception by the Communicant."

XI. That in the same passages the Respondent maintained or affirmed "That in the Holy Communion the natural Body and Blood of our Saviour Christ are not only in heaven, but here, to wit, upon or before the Altars (thereby referring to the Communion Tables) of the Churches of the United Church of *England* and *Ireland*, under the form of Bread and Wine."

XII. That the Respondent maintained that the wicked and such as be void of a true and lively faith in partaking of the Holy Communion, receive or are partakers of the true Body and Blood of our Lord (1).

XIII. That the Respondent maintained "that the Holy Communion Table is an Altar of sacrifice, at which the ministering Priests appear in a sacerdotal position at the celebration of the Holy Communion, and that at such celebration there is a great sacrifice or offering of Jesus Christ by the ministering Priest; and that in such sacrifice or offering the Mediation of Jesus ascends from such Altar to plead for the sins of men."

XIV. That the Respondent maintained "that in the Sacrament of the Lord's Supper there is an actual presence of the Body and Blood of our Lord in the consecrated Bread and Wine."

XV. That the Respondent maintained "that the true Body and Blood of our Lord are actually and visibly present upon the Altars and under the form or veil of, and in, the Sacramental Bread and Wine, by virtue of and after consecration of the same, irrespective of the faith and worthiness of the Communicant, so as to be received by all Communicants irrespective of their faith and worthiness."

XVI. That the Respondent maintained "that the true Body and Blood of our Lord are actually and visibly present upon the

(1) The whole of this Article was struck out by the Dean of the Arches, as charging, with other passages already noticed, the Respondent with contravening the 29th Article of Religion. The disallowance of which Article was confirmed on the previous appeal.

Altars, and under the form or veil of, and in, the Consecrated Bread and Wine, prior to and separately from the act of reception by the Communicants."

XVII. That the Respondent maintained "that in the Holy Communion the natural Body and Blood of our Saviour Christ are not only in heaven but here, to sit upon or before the Altars," &c.

XVIII. That the Respondent maintained "that all who come to the Lord's Table, including the wicked and such as be void of a lively faith in partaking of the Holy Communion, receive or are partakers of the Body and Blood of our Lord" (1).

XIX. That the Respondent maintained "that the Holy Communion Table is an Altar of a Sacrificial Character, at which the ministering Priests of the Church of *England* discharge a sacerdotal office at the celebration of the Holy Communion, and that at such celebration there is a living, real, spiritual offering of Jesus Christ by the ministering Priest."

XX. That the Respondent maintained "that adoration or worship is due to the Consecrated Bread and Wine."

XXI. That the Respondent maintained "that in the Sacrament of the Lord's Supper there is an actual presence of the Body and Blood of our Lord in the Consecrated Bread and Wine."

XXII. That the Respondent maintained, as before stated, the actual and objective Presence of our Lord upon the Altar, under the form or veil of, and in, the Sacramental Bread and Wine after consecration.

XXIII. That the Respondent maintained the doctrine of the actual and objective Presence, as before charged, "prior to and separately from the act of reception by the Communicant."

XXIV. That the Respondent maintained "that the natural Body and Blood of our Saviour Christ are not only in heaven but here."

XXV. That the Respondent maintained the doctrine regarding the reception by the wicked, as charged in the 12th and 18th Articles; and which 25th Article was, like them, expunged.

XXVI. That the Respondent maintained "that the Holy Com-

(1) This Article, like the 12th, and for the same reason, was expunged by the Dean of the Arches and the Judicial Committee.

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munion Table is an Altar of a Sacrificial Character, as charged in the 19th Article."

XXVII. That the Respondent, in the passages therein specified and referred to, and thereinbefore set forth, maintained "that adoration is due to Christ, present upon the Altars of the Churches in the Sacrament of the Holy Communion, under the form of Bread and Wine, on the ground that under their veil is the Sacred Body and Blood of our Lord and Saviour Jesus Christ."

XXVIII. That each of the said Doctrines or Positions so maintained or affirmed, and promulgated by the Respondent, as charged in the 8th, 9th, 10th, 11th, 14th, 15th, 16th, 17th, 21st, 22nd, 23rd, and 24th Articles respectively, is contrary and repugnant to the Doctrines or Position of the said Church as set forth in that part of the Rubric at the end of the Order of the Administration of the Lord's Supper, which is in the words following: "Whereas," &c. (being the Declaration regarding Kneeling); contrary also to the Doctrines or Positions contained in the Thirty-nine Articles of Religion, whereby it is declared that Christ ascended into heaven, with his body, with flesh, bone, and all things appertaining to the perfection of man's nature, and there sitteth until He return to judge all men at the last day; contrary also to that part of the 28th Article which affirms of the Lord's Supper, that, &c., and to the 29th Article; contrary also to the doctrines contained in the Exhortation to the Communicants in the Order of the Administration of the Lord's Supper, "and to the end," &c.; to the Prayer after the Communion, "We most heartily thank Thee," &c.; contrary to the Prayer of Consecration in the said office; contrary to the doctrines contained in the Catechism in the Book of Common Prayer, regarding the nature of the Sacrament of the Lord's Supper; to the Collect for the Sunday after Ascension Day; contrary also to the third Rubric at the end of the Communion of the Sick; which Doctrines of the Church are more largely expressed in the pages in that Article set forth and taken from the 27th of the Second Book of Homilies, entitled "An Homily of the worthy receiving and reverent esteeming of the Sacrament of the Body and Blood of Christ."

XXIX. Which was in effect a repetition of the previous Article, was wholly struck out.

XXX. That each of the Doctrines or Positions so maintained or affirmed and promulgated by the Respondent, as charged in the 13th, 19th, and 26th Articles respectively, is contrary and repugnant to the Doctrine, Position, and teaching of the Church, as contained in the 31st of the Thirty-nine Articles of Religion, and as contained in the second warning for the celebration of the Holy Communion, to the address to the Communicants, and to the Preface for Easter Day, and the Prayer of Consecration, and to the Prayer next after the Lord's Prayer at the conclusion of the Office; contrary also to the teaching of part of the 15th of the Thirty-nine Articles, and to the definition of the Sacraments generally, and specially of that of the Lord's Supper in the 25th and 28th Articles of Religion, to those parts of the Catechism which treat thereof, and to the Rubric at the end of the Office of the Communion of the Sick; contrary also to the 82nd of the Canons and Constitutions Ecclesiastical made in the year 1604, and more largely expressed in the Second Homily of the First Book of Homilies, entitled, "Of the Misery of all Mankind, and of his condemnation to Death Everlasting by his own Sin," and to various passages in the 27th of the Second Book of Homilies, in this Article of Charge set forth; and in a part of the 28th of the Second Book of Homilies, entitled, "A Sermon for Whit-Sunday."

XXXI. That each of the Doctrines or Positions so maintained and affirmed, and promulgated by the Respondent, as charged in the 20th and 27th Articles of Charge, is contrary to the 28th Article of Religion, and to the Rubric at the end of the Order for the Administration of the Lord's Supper.

XXXII. That in proof of the matters alleged the same Books and Pamphlets already mentioned were annexed.

XXXIII. That the Respondent, being a Priest in Holy Orders, had been duly charged with having offended against the Laws Ecclesiastical within two years last past, and by reason thereof was, under the Statute 3 & 4 Vict. c. 86, and the proceedings taken thereunder, subject to the jurisdiction of the Court.

XXXIV. That all and singular these premises were true.

The present appeal was from so much of the Interlocutory Decree of the 30th of June, 1870, as, in effect, directed the reformation in the Articles made by the Judge himself, as also from

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the Order of the 16th of June, 1870, whereby he, in effect, declined to allow the passages struck out in the Articles so reformed to be reinstated; and also from the final Sentence or Decree of the 23rd of July, 1870.

No appearance was entered by or on behalf of the Respondent; and a special day having been appointed for the hearing, of the which the Respondent had due notice, the appeal came on for hearing, the Respondent still declining to appear, either in person or by Counsel.

Mr. *A. J. Stephens*, Q.C., Dr. *Tristram*, Mr. *Archibald*, and Mr. *B. Shaw*, appeared for the Appellant.

Mr. *A. J. Stephens*, Q.C.:—The Articles of charge against Mr. *Bennett*, and for which he was cited, are for maintaining false doctrine in three different Works, printed and published by him, viz., in a Book entitled, "The Church and the World," which contained an Essay or Review entitled, "Some Results of the Tractarian movement of 1833;" and in the second and third editions of a Book or Pamphlet entitled "A Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*."

The nature of the false doctrine contained in these Works, and specified in the Articles of charge, has reference to, (1), the actual and true Presence of our Lord under the form of Bread and Wine upon the Altars of our Churches; (2), the Visible Presence of our Lord upon the Altar; (3), Sacrifice offered by the Priest; (4), Adoration of the Consecrated Elements; and, (5), the Reception by the Wicked, which eat not the Body of Christ in the use of the Lord's Supper. This last charge was rejected by the learned Dean of the Arches on the ground, (1), that the Charge was not preferred before the Commissioners under the *Church Discipline Act*, and was not included in the Citation; and, (2), that it was not proved that Mr. *Bennett* maintained the doctrine of Reception by the Wicked, as charged in the 12th, 18th, and 25th Articles, which were ordered to be reformed by striking out all that related "to the charge of contravening the 29th Article of Religion, as to the Reception of the Eucharist by the Wicked." From this judgment there was an appeal to Her Majesty in

Council, and the Judicial Committee held, that the first ground assigned by the learned Judge for rejecting the Charge was untenable (1). But as to the second ground their Lordships held that the learned Judge was justified in directing the Articles to be reformed, "because they did not set forth any passages from Mr. *Bennett's* Work in which Mr. *Bennett* maintained any doctrine impugning the 29th Article of Religion." It appears, therefore, that the reformation of the Articles extended only to the Charge of Reception by the Wicked, and did not apply to the other Charges contained in the Articles; when, however, the case came before the Dean of the Arches for the final admission of the Articles, that learned Judge not only struck out everything that related to the Charge of Reception by the Wicked, but he also struck out certain passages in Articles 5, 6, 7, and 32, which related to the Real Presence and Adoration. It is against such rejection, which applies to the Real Presence and Adoration, as well as to the general decree or judgment of the Dean of the Arches, that we now appeal.

THEIR LORDSHIPS, after consultation, gave Counsel permission to argue the case on the assumption that the passages struck out by the Dean of the Arches in the 5th, 6th, 7th, and 32nd Articles of Charge were restored so far as they bore upon the subjects of the "Real Presence" and "Adoration." As, however, no point in the ultimate judgment of the Court turned upon these passages, they have not been reinserted in the Articles before given.

Mr. *A. J. Stephens*:—Taking, therefore, the doctrines of the Visible Presence, the Sacrifice, and the Adoration of the Elements as maintained by Mr. *Bennett*, and set forth in the extracts pleaded in the Articles, I proceed now to shew that these doctrines are contrary and opposed to the teaching of the Church in her Articles, Formularies, Prayers, Services, Catechism, and Homilies, and are in direct violation of the Canons and Constitutions Ecclesiastical, particularly those we have specially pleaded in the 28th and 30th Articles of Charge.

The first question for your Lordships to consider will be, the sufficiency of Mr. *Bennett's* retractation of his profession and teach-

(1) See *ante*, p. 357.

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ing of "the Visible Presence of our Lord upon the Altars of our Churches," as charged in the 15th and 16th Articles, referring to the 7th Article, which contains passages from his Letter or Pamphlet, entitled "a Plea for Toleration," &c., in which that doctrine is maintained. It appears that the words articled on were in the two first editions of the Respondent's Pamphlet, but that in a third edition he substituted for those words: "The Real and Actual Presence of our Lord under the form of Bread and Wine upon the Altars of our Churches," adding that his meaning in writing the original passage was precisely the same as that which was conveyed in the words substituted. The learned Judge, the Dean of the Arches, stating at the termination of his judgment the conclusions of Law at which he had arrived, says, regarding this heresy: "With respect to the first and uncorrected edition of his Pamphlet, I pronounce that Mr. *Bennett*, by his language respecting the Visible Presence of our Lord, and the Adoration of the Consecrated Elements, has contravened the law of the Church. If Mr. *Bennett* had not renounced this language, and substituted other for it, I must have considered, whether I ought not to pass a sentence of suspension upon him, accompanied by a Monition to abstain for the future from such language. The question is not now before me, whether this retractation of Mr. *Bennett* would have sufficed to satisfy the severe provisions of the Statute, 13 Eliz. c. 12, but whether this retractation, however ungraciously made, be not sufficient under the general law to indicate that he has finally abandoned the unlawful expressions which he had used. I think, on the whole, they are sufficient for this purpose." Now we respectfully deny the reasoning as well as the conclusions of the learned Judge. The substitution of the words used in the third edition of his Pamphlet by Mr. *Bennett* was no renouncement or retractation of the words used in the first and second editions; and, coupled with the explanation that his meaning was in both passages the same, was no indication of his having abandoned the expressions that he had in the first instance used, and which the learned Judge himself pronounces unlawful. We submit that, holding the opinion of their illegality, the learned Judge was bound to require, in conformity with all Ecclesiastical Law, a formal Abjuration or Revocation, or to have proceeded to pronounce

the sentence be indicated. The general law in regard to Clerks convicted of heresy is to be found in *Ayliffe's Parergon*, p. 292 [2nd Ed. 1734], and in the 3rd Canon of the Constitutions of Archbishop *Arundel*, A.D. 1408, *Johnson's* Canons, vol. II. p. 463. A form of Abjuration is given in Vol. II. of *Hook's* Lives of the Archbishops of *Canterbury* (N.S.), p. 401, used by Archbishop *Cranmer* in 1555.

Thus, under the general Ecclesiastical Law a Clergyman could not free himself from punishment by abjuring until after Sentence had been pronounced; but under the Statute, 13 Eliz. c. 12, the severe provisions of which the learned Judge speaks of (and which is the only direct legislation since the Reformation for the punishment of Clerks for heresy), a Clergyman can free himself from punishment by Revocation before Sentence has been pronounced. The only cases on the Statute of *Elizabeth* in which the construction of the phrase "revoke his error" has been determined, are *The Procurator-General* v. *Stone* (1), and *Burder* v. *Heath* (2). In the former Lord *Stowell* held "that a promise of future silence was not a revocation of the past;" and in the latter, this Tribunal held, that the mere expression of regret was not a sufficient revocation; but that there must be a formal revocation. The alterations made by Mr. *Bennett* are neither an abjuration to satisfy the general law, nor a revocation to satisfy the Statute of *Elizabeth*.

The Appellant, therefore, is entitled to a judgment on the 15th and 16th Articles, and to have a formal Abjuration by Mr. *Bennett* of the language that he has used in the first and second editions of his "Plea for Toleration." Taking, however, the language used by Mr. *Bennett* in his third edition of the "Plea for Toleration," the charge against him is, that he maintains that after Consecration there is in the Elements on the Altar, and in the hand of the Priest, and, therefore, irrespective of the Communicant, a Real and Actual Presence of the true Body and Blood of Christ; not a figurative, mystical, or sacramental Body. That latter doctrine he absolutely denies. Now, it is not the doctrine of a Real Presence in the abstract that is the subject of this charge against Mr. *Bennett*, but the particular kind of Real Presence which he maintains, and which is illustrated by a passage in the Life of *Cranmer*, in Vol. II. of *Hook's*

(1) 1 Hagg. Cons. Rep. 424-432. (2) 15 Moore's P. C. Cases, 76.

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Lives of the Archbishops of *Canterbury* (N.S.), p. 152, referring to the rejection by the English Reformers of *Luther's* view of the manner in which our Lord is present in the Sacrament, namely by Consubstantiation. Dr. *Waterland*, in his Doctrine of the Eucharist, [Ed. 1868], p. 308, states the true effects of Consecration, and gives the Church's view of what the Real Presence is. But the Presence which we say Mr. *Bennett* in his writings maintains is the External Real Presence, not the Internal Real Presence, as defined by *Hooker*, Ecc. Polity, B. V. ch. 67, s. 2, and s. 6, who says: "The Real Presence of Christ's most blessed Body and Blood is not to be sought for in the Sacrament, but in the worthy receiver of the Sacrament." To come, however, to the expression of the Real and Actual Presence introduced by Mr. *Bennett*, and substituted by him in his third or amended edition of his Pamphlet "Under the Form of Bread and Wine." Such formula we maintain is unauthorized by, and contrary to, the doctrine of the Church. It is borrowed from the Church of *Rome*, and was adopted by that Church as the precise expression of Roman doctrine on the Real Presence. It is found in the Council of *Lateran*, under Pope *Innocent* III., when the doctrine of Transubstantiation was for the first time decreed: IV. Lat. Conc. A.D. 1215, and in *Ussher's* "Answer to a Jesuit," p. 74; *Cranmer's* Lord's Supper, pp. 51–53. It occurs in one place only in documents connected with the Church of *England*, namely, as an advertisement at the end of the First Book of Homilies, p. 147 [Ed. *Oxford*, 1859]. That Book was published in 1547, when the Six Articles Act, 31 Hen. 8, c. 3, which enforced under penalty of death the doctrines of the Real Presence and Transubstantiation, was in force, such doctrines being expressed in this very Formula, "under the Form of Bread and Wine:" 3 Stat. of the Realm, p. 739 [Ed. *Lond.* 1827]. The Six Articles Act was repealed in 1547, by 1 Edw. 6, c. 12; and the second Book of Homilies, prepared by *Cranmer*, was published in 1563, in which this Formula was abandoned and a Sermon substituted under the title "Of the worthy receiving and reverent esteeming of the Sacrament of the Body and Blood of Christ:" *Ib.* p. 439. In the same Book, p. 433, is the "Homily of the Resurrection," which is nearly a verbatim reprint of one of *Taverner's Postils*, printed in 1540, in the original of which the words "Christ in the

Form of Bread" occur, those words were omitted, and are not to be found in the Homilies recognised and authorized by the 35th Article of Religion. Though found in some of the early Service Books, as in the Primer of *Henry* VIII. in 1545 (*Burton's* Three Primers, p. 498), and in a modified form in the Primer of *Edward* VI., in 1551, it did not occur in the Second Primer of *Edward* VI. (Liturgies of *Edward* VI.), but was republished, in 1559, as part of *Henry* VIII.'s Primer, in the Primer of Queen *Elizabeth* at the beginning of her reign (Private Prayers of Queen *Elizabeth*, p. 86), though omitted in the Latin form of her Primer in 1560 (*Ib.*, 581), and in the revised edition of the Primer in English, published in 1566, the formula was omitted. The formula is partially used in the Work known as the "Necessary Erudition of a Christian Man" (Formularies of Faith [*Oxford* Ed., by *Lloyd*, 1825]), the phrase being "under the form of bread;" but the point there in discussion was the Roman doctrine, that both Body and Blood are received under the form of each element separately. The Work, however, in question is no authority for the use in the Formularies of the Church. The learned Dean of the Arches assumes that the formula we object to is still in the Second Book of Homilies, which we deny, the phrase occurring only in an advertisement; and in his examination whether the phrase is or is not in accordance with "the Formularies of the Church," he infers from the authorities he cites, which we do not controvert, that the words used in the Six Articles Act, do not *per se* express the doctrine of Transubstantiation. We agree that the doctrine of the Real Presence and Transubstantiation are distinct and different. What we contend is, that no Protestant Divine of the English Church has been cited by the learned Judge who has used the Formula objected to, to express the Real and actual Presence of our Lord upon the Altars of our Church as held by Mr. *Bennett*.

I now proceed, in order to ascertain the doctrine of the Church of *England* in reference to the questions at issue, to the Historical Examination of the Formularies. The first Work pertaining either to Public Worship or to the teaching of the Church of *England*, which was put forth in the reign of *Edward* VI., was the First Book of Homilies. Then came "The Order of the Communion" to be added to the Office of the Missal, which was still in use, and

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not yet reformed. In 1548 a Royal Commission was issued to *Cranmer* and others "to draw an Order of Divine Worship," with instructions not to innovate, but to remove innovations. The labours of these Commissioners were embodied in the first Prayer Book of *Edward* VI., which became law by the first *Act of Uniformity* (2 & 3 Edw. 6, c. 1): *Cardwell's* Two Liturgies, p. 427. The *Sarum* Missal was, in 1549, the Chief Service Book of the unreformed Church of *England*, and was the basis of the reformed Communion Service, which omitted the passages that inculcate the Worship of Saints, the Sacrifice of the Mass, the Elevation and Sacramental Adoration, and that which referred to the "Real Presence." All these passages are to be found in *Walker's Sarum* Missal (p. 75 to 78). The Rubrics preceding the act of reception by the Priest in the words, "Here he receives the Body," and "Here he communicates himself in the Blood" (*Ibid.* p. 78), were also omitted, and the Rubrics, as they now stand, inserted, which designate the Elements as the Sacrament of the Body and Blood, as taught by the 29th Article of Religion (Liturgies of *Edward* VI., p. 92; *Cardwell's* Two Liturgies). The Prayer of Consecration was also materially altered and modified, and the expression "Holy Mysteries" introduced into the Communion Service (*Walker's Sarum* Miss., p. 65; Liturgies of *Edward* VI., pp. 80, 88, and 92). The result of these comparisons proves that the doctrine of the External Real Presence was eradicated. The Second Prayer Book of *Edward* VI. was put forth in 1552, under the influence and by the assistance of *Cranmer* and *Ridley*. The learned Judge of the Arches is in error in supposing that *Cranmer's* opinions were at that time decidedly of a *Lutheran* character, and that the putting forth by him of the Catechism of *Justus Jonas* was an evidence of that fact. Such conclusions are not supported by history or authority. *Burton's Cranmer's* Catechism, [*Oxford* Ed., 1829], pp. 8, 176, 177, 207, 208; *Cranmer's* Treatise on the Lord's Supper, Works, p. 374; Archb. *Laurence's Bampton* Lectures, pp. 17, 45, and 240; all shew, that *Cranmer* held no Presence in the Elements, no Corporal Presence, but a Spiritual Presence only to the Soul of the faithful receiver. The same doctrine was adopted and professed by Bp. *Ridley* (8 *Hooker's* Biog. Dict., p. 219); Bp. *Ridley's* Works, pp. 240, 241; *Bullinger's* Letters, p. 322 [Ed. *Park.* Soc.]. The object of the Legislature in putting forth

the second Prayer Book of *Edward* VI. are stated in sect. 4 of the second *Act of Uniformity* (5 & 6 Edw. 6, c. 1), and fully appear by a comparison of the two Liturgies of *Edward* VI. (*Cardwell's* Two Liturgies, p. 92), and entirely excluded the doctrine of the Real Presence. Moreover, this Second Prayer Book of *Edward* VI. contained the Declaration on Kneeling, which conclusively shews both the opinion of the framers of that Liturgy, that it was the direct object and intention of the Service then established to exclude all notion of a Real Presence by declaring that, "As concerning the natural Body and Blood of our Saviour Christ, they are in Heaven, and not here; for it is against the truth of Christ's true natural Body to be in more places than one at one time." And that at that time this was the true doctrine of the Church is further evidenced by the Articles of Religion of 1552, which, though not confirmed by Parliament, were published by the King's authority, and contained a like declaration as to the Body of Christ: *Hardwick's* Articles [*Lond.*, 1859, p. 312]. On the accession of *Elizabeth*, the first Act of Her reign reinvested the Crown with jurisdiction in Ecclesiastical and Spiritual matters. The second Act was *Elizabeth's Act of Uniformity*. That was preceded by a Committee of Divines, who were directed to review the two Books of Common Prayer of *Edward* VI. (*Cardwell's* Conferences, p. 53), and on whose advice the second Book of *Edward* VI. was ultimately restored with some modifications (*Keeling, Liturg. Britan.*, pp. 217, 219), but without doctrinal change (*Whitgift's* Works, vol. iii., p. 98; *Hooker's* Life, 8 Biog. Dict., p. 745). It is true that the Declaration on Kneeling was omitted in *Elizabeth's* Prayer Book, but the reason no doubt was because that Declaration had been added to the Prayer Book of *Edward* VI. without the authority of Parliament, a fact which the learned Judge in the Court below has in his comments on this omission entirely overlooked. The omission, however, to restore this Declaration is unimportant, since it was substantially restored by the *Act of Uniformity* of *Charles* II. The next material event in the history of the Church was the enactment by Parliament in the 13 Eliz., c. 12, of the Thirty-nine Articles of Religion.

It will be necessary to consider only the 28th Article, "Of the Lord's Supper." That Article was founded on the 29th Article of

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the Articles of 1552. It contains four sections; the first sets forth the doctrine of the Church of *England* on the Lord's Supper in a positive form, declaring what is to be believed respecting it; the other three sections are negative, declaring what things are not to be believed or done respecting it. That first section alone is conclusive against Mr. *Bennett's* teaching of a Real and Actual Presence. The second section of the Article is not applicable to the case, as no charge is made against Mr. *Bennett* in respect of Transubstantiation. The third section is equally opposed as the first to the teaching of Mr. *Bennett*, by its denying any corporal manner of giving, receiving, or eating the Body of Christ. The words are a substitution, which is merely in the phraseology, for those in the third section of the same Article, in those of 1552, *Hardwick's* Articles [*Lond.*, 1859, p. 312], the meaning is precisely the same. The giving of the Body of Christ spoken of is by God, and not by the Priest: *Hammond*, Prac. Catechism, Anglo-Catholic Lib. p. 396; Bishop *Nicholson*, Exposition of Cat. of the Church of *England*, *Ib.* 183; Bishop *Morton*, Cath. Appeal for Protestants, Lond. 1610, p. 131; Dean *Jackson's* Works, vol. ix., p. 594 [Ed. *Oxford*, 1844]; Bp. *Hooper*, Early Writings [Ed. *Park.* Soc. p. 191]; Homilies, p. 445. If we examine *Nowell's* Catechism (pp. 94, 207, 215, 216), a Work of the greatest importance, approved and followed by Convocation in framing the Thirty-nine Articles, we shall find the whole doctrine of the Lord's Supper declared to be decisively against the Real Presence: *Cardwell's Synod.* Vol. I., p. 128. In 1563 was issued the second Book of Homilies, with a reprint of the First Book, which had been issued in 1547. This second Book contains a Sermon entitled, "An Homily of the worthy receiving and reverent esteeming of the Sacrament of the Body and Blood of Christ," and teaches as the doctrine of the Church of *England*, (1), that in the Lord's Supper "the incorporation of the Body and Blood of Christ" is "in the souls of the faithful through faith"; (2), that in the Lord's Supper the meat we seek for is spiritual food, the nourishment of our Soul—a heavenly refection, not earthly; (3), that this spiritual food is to be received and enjoyed by faith alone; and, (4), that "unbelievers and faithless cannot feed upon that precious Body," but receive only "the outward Sacrament." Next come the Canons

of 1603, which confirm the Eucharistic Doctrine of the Prayer Book, and of *Nowell's* Catechism. The 57th Canon states "that the doctrine of the Lord's Supper is sufficiently set down in the Book of Common Prayer." In the same year the additions to the Catechism of *Edward* VI.'s second Prayer Book were set forth, in these, which were an explanation of the Sacraments, the word "Sacrament" is always used in the sense of an Ordinance, never in that of the Elements; the words "inward" and "outward" apply to the recipients only; by "the faithful," the worthy recipients are meant; these additions give no sanction to the error of the Real Presence, but affirm the doctrine of the Thirty-nine Articles, and of the Communion Office; and are known to be an abridgment of *Nowell's* Catechism: Bishop *Jackson's* Pref. to *Nowell's* Catech. p. xxxvii., *Ib.* p. 212. In 1662 the *Act of Uniformity* was passed, and the Prayer Book now in use enacted. The Thirty-nine Articles were ratified and confirmed, and the Declaration on Kneeling restored. This was done, as it appears, after and in consequence of the *Savoy* Conference (*Cardwell's* Conferences, p. 322), and the revision of the Prayer Book in 1661. There was, however, one remarkable difference in the Declaration on Kneeling then established; the Declaration in 1552 contained a denial of "any real or essential Presence there being of Christ's natural flesh and blood." In the Declaration in 1662 the words "real and essential Presence there being," were omitted, and the words "corporal Presence" substituted. This alteration did not make any doctrinal change; the change was exclusively one of phraseology, and arose from the change that had taken place in the language of the Eucharistic Controversy between 1552 and 1662. The use of the phrase is illustrated by the language of Protestant Divines between those years: Archd. *Philpot*, Examinations [*Park.* Soc. Ed.], p. 130; Archb. *Ussher's* Irish Articles of Religion, 94th Article; *Elrington's* Life of *Ussher*, App. p. xlix.; *Cosin*, Works, vol. iv., p. 170; Liturgy of *Edward* VI., English and Latin, pp. 534–577; *Cranmer's* Treat. on the Lord's Supper, p. 47, Works [Ed. *Park.* Soc.] Previous and down to 1662 the phrase "Corporal Presence," bore one definite meaning, namely, the "Presence of the Body of Christ in the Sacred Elements," and was so interpreted by both Roman and Protestant Divines, the former

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asserting the doctrine to be true, the latter denying it altogether. Bp. *Gardiner*, writing in 1550, against *Cranmer* (*Cranmer's* Lord's Supper, p. 155); *Harding*, in 1564, against *Jewel* (Sermons, p. 455;) are Roman authorities. Dr. *Hammond*, Prac. Catechism, p. 385; *Westminster* Confession, Art. 7, in *Hale's* Harmony of Protestant Confessions, p. 601; these are Protestant Divines. The learned Judge in the Court below denies that the terms in the two Declarations are equivalent, and holds that "Corporal" means something local. We maintain that the Declaration is destructive of the doctrine of the Real Presence, and was intended to be so. *Burnet*, Hist. of His Own Times, vol. i., p. 333, gives the history of the Declaration, which is conclusive as to its intention as well as its meaning.

Now, the "Natural Body of Christ" spoken of in the Declaration, is so called to distinguish the "true" Body of Christ, from his mystical Body, the Church; but they are one and the same Body, and are so held by the highest Ecclesiastical authorities: *Hooker*, Ecc. Polity, chap. 55; Bishop *Ridley's* Works, p. 236; *Foxe's* "Actes and Monuments," vol. vi. p. 302; *Card.* Synod. p. 406. The Spiritual Body and the Spiritual Presence of Christ are defined and illustrated by *Jewel* (Sermons, p. 484 [Ed. *Park.* Soc.]), and Bishop *Jeremy Taylor* (Works by *Eden*, vol. vi., p. 17, p. 669; *Cranmer's* Lord's Supper, pp. 95, 96, 100.) The doctrinal importance of the Declaration on kneeling is evidenced, therefore, from its manifest intention and purport that the Body of Christ cannot be adored in the Elements; that it is in Heaven, not here, and can only be partaken of in a Spiritual and heavenly manner by those who worthily receive it in the Lord's Supper. This is the language of all the authorities, and is the true teaching of the Church in her Articles and Formularies. We submit, therefore, that since the true Body of Christ is but one, and that Body is the natural Body, the Articles 11, 17 and 24 of Charge have been proved, and that Mr. *Bennett* ought to be condemned thereon.

We come now to the consideration of the 13th, 19th, and 26th Articles of Charge, which impute to Mr. *Bennett* false doctrine and false teaching regarding the celebration of the Holy Communion, by maintaining that there is at that celebration a great, living, real and Spiritual Sacrifice or offering of Jesus Christ by the

ministering Priest. This, which is termed the Eucharistic Sacrifice, is the second charge of false doctrine made against Mr. *Bennett*. This, we maintain, is at direct variance with the teaching of the 31st Article of Religion, but is consistent with the 3rd Canon of the Council of *Trent*, which declares the Sacrifice of the Mass to be propitiatory. Now, it is to be observed, that this doctrine of the Eucharistic Sacrifice, or the Sacrifice of the Mass, as it was termed before the Reformation, was utterly rejected by the Reformers, and was obliterated in the Church of England, as appears from a comparison of the Prayers constituting the Sacrifice of the Mass (*Walker's Sarum* Missal, pp. 51, 53, 65, 67, and 81), and the first and second Prayer Books of *Edward* VI. (Liturgies of, pp. 88, 89–92); *Faulkner* v. *Litchfield* (1). The doctrine of the Church in regard to Sacrifice is further set forth in the Homilies, Book I., p. 22, and Book II., p. 440. In the Church Catechism, in the answer to the question, "Why was the Sacrament of the Lord's Supper ordained?" which accords with the description given in *Nowel's* Catechism, p. 215, and has been commented on and illustrated by the judgment in this Court in the case of *Westerton* v. *Liddell* (2), and *Parker* v. *Leach* (3). The learned Judge in the Arches Court has commented on these authorities, and in the view he takes does not think that Mr. *Bennett's* language conflicts with them, or that he has exceeded that liberty of expression which has been used by the Divines whom he has cited.

The last charge against Mr. *Bennett*, is that of Sacramental Adoration. This charge is contained in Articles 20 and 27. Art. 20 is founded on the language used by Mr. *Bennett* in the second edition of his Plea for Toleration, and charges him with maintaining the doctrine that Adoration, or Worship, is due to the consecrated Bread and Wine; but as he has substituted in the third edition "Christ present in the Sacrament under the form of Bread and Wine," as charged in the 27th Article, to that charge I now confine my present argument. This is the Romish doctrine, consistent with Romish practice (*Brevint's* Depth and Mystery of the Roman Mass, p. 109 [*Oxford* Ed. 1673]; *Harding*, in *Jewel*, Sermon, p. 523). The worship of the Sacrament, as the worship

(1) 1 Robt. 184. (2) Moore's Spec. Rep. pp. 176–7, 180–1.
(3) Law Rep. 1 P. C. 326.

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of Christ therein, *i.e.*, in the Elements, was the practice of the unreformed Church of England at the death of *Henry* VIII. (*Sarum* Missal of 1519 and 1527 [Ed. *Lond.* 1868], p. 311). The Rubric which follows upon the words used by the Priest in consecration, "for this is my Body," gives the following Order: "Let the Priest incline to the Host, and with bowed head adore it, and afterwards elevate it above his forehead, that it may be seen by the people." This Rubric was omitted from the first Prayer Book of *Edward* VI., and a new Rubric inserted after the Prayer of Consecration in the following language, as found in the Liturgies of *Edward* VI., *Cardwell*, p. 89: "These words, as before rehearsed, are to be said turning still to the Altar, without any elevation or shewing of the Sacrament to the people." There is a similar alteration in the position and object in the service of the hymn known as the "*Agnus Dei*" (*Sarum* Miss., p. 317, Liturgies of *Edward* VI., p. 92), the singing of which is postponed till after the Consecration of the Elements. The object of the Reformers in thus postponing this Hymn was, that it should no longer be addressed to any supposed presence of Christ in the Elements on the Altar; and, therefore, it was not used until the Elements were in the process of consumption. It appears from the Visitation Injunctions of Bishop *Ridley*, in 1550, that the Romish-inclined Priests evaded this Rubric, and the Reformers, in framing the second Prayer Book in 1552, by the alterations they then made (Lit. of *Edward* VI., p. 92), shewed their view and intention regarding it. The Adoration of the Sacrament is expressly condemned by Art. 28 of the 39 Articles: "The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped," which in *Martin* v. *Mackonochie* (1) was held by this Tribunal to be a direct prohibition of the worship of the Sacrament. *Dugdale's* Life of Bishop *Geste*, p. 119. There is then the further and conclusive prohibition in the Declaration on Kneeling. The learned Judge of the Arches in his judgment says, that Mr. *Bennett's* doctrine in teaching the Adoration of Christ present in the Sacrament "is not at variance with the Declaration on Kneeling, which discountenances the worship of the Elements and of the corporal Presence of Christ. Nor is it repugnant to the 28th Article

(1) Law Rep. 3 P. C. p. 413.

of Religion, as suggested by the Promoter; for that Article contains no Declaration against the Adoration of the Spiritual Presence of Christ in the Holy Eucharist?"—a construction and inference which we entirely deny, as against the plain meaning of the language used, and all the authorities cited or referred to by the learned Judge; supported and confirmed by no less an authority than Bishop *Beveridge*, who, in a Discourse upon the Thirty-Nine Articles, in his *Ecclesia Anglicana Ecclesia Catholica*, Works, vol. vii., p. 490, commenting on the last clause in the 28th Article, which prohibits the worship of the Sacrament, says, "And if the primitive Church was against the reservation, surely it was much more against the Adoration of the Sacrament," holding, as we have shewn before, that no person or thing, under any pretence whatsoever, ought to be worshipped, besides God. "I know it is not bare Bread our Adversaries say they worship, but Christ in the Bread, or the Bread in the name of Christ. But I wish them to consider what *Gregory Nyssen* long ago said: 'He that worshippeth a creature, though he do it in the name of Christ, is an Idolater, giving the name of Christ to an Idol;' and, therefore, let them not be angry at us for concluding them to be Idolaters, whilst they eat one piece of Bread and worship the other, and for asserting that the Sacrament ought not to be reserved, carried about, or worshipped.'" We insist, therefore, that Mr. *Bennett's* teaching of Adoration of Christ present under the form of Bread and Wine on the Altar, as well as on the subjects of Sacrifice and Worship, is contrary to the law and doctrine of the Church, set forth in her Articles, Formularies and Services, and as held and interpreted by all her best and soundest Divines, and that Mr. *Bennett* has exceeded the liberty which the law allows upon these subjects, and ought to be condemned.

The learned Dean of the Arches by his judgment has decided that the Formularies of the Church exclude no other forms of doctrine than these two, namely (1) Transubstantiation and (2) the denial of grace in the Sacrament, which he attributes to *Zwingli*. With the exception of these two errors the learned Judge considers that any doctrine on the subject of the Presence is compatible with the Formularies. That the language of the Formularies is not definite upon the subject of the Presence, and that, therefore, the language of great Divines of our Church may be

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appealed to who support the doctrine as maintained by Mr. *Bennett*. The learned Judge cites *Ratramn* and *Ælfric*, who lived six or seven hundred years before the reign of *Edward* VI., and cannot be authorities for the interpretation of the Formularies of the Church. He cites Bp. *Ridley* also (Works, p. 202) as adopting *Ratramn's* opinions, which are best expressed by the Bishop of *St. David's*, in his charge of October, 1857, p. 134. The learned Judge quotes also Bp. *Ridley* (Works, p. 272), Bishop *Jewel* (Apology, p. 13), Bishop *Overall* (Note to *Nicholl's* Book of Common Prayer), *George Herbert*, Archbishop *Laud*, Bishop *Andrewes*, Dr. *Donne*, Bishop *Cosin*, Bishop *Forbes*, Dr. *Jackson*. He refers to the Council of *Ephesus*, and quotes from *Ken's* Catechism, Bishop *Jeremy Taylor*, Dr. *Hey*, Bishop *Pearson*, Dean *Brevint*, *Thorndike*, a coadjutor not a Commissioner at the *Savoy* Conference (*Cardwell's* Conf. p. 257), Archbishop *Bramhall*, *Sparrow*, Archbishop *Tillotson*, *Yardley*, Bishop *Beveridge*, with many other Authors, both living and dead, all of which are set out in the judgment of the learned Judge; but which, when examined, we confidently maintain do not warrant the opinion expressed by the learned Judge, or justify the doctrines affirmed by Mr. *Bennett*, or the language which he has adopted to express them, and which the learned Dean of the Arches holds are not opposed to the true interpretation of the Articles and Formularies of the Church (1).

Dr. *Tristram* followed Mr. *Stephens*.

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The consideration of their Lordships' judgment was reserved, and now pronounced by

THE LORD CHANCELLOR:—

This is an appeal from the final Sentence or Decree pronounced by the Dean of the Arches Court of *Canterbury* on the 23rd of July, 1870, and also from two Interlocutory Orders made by the same Judge, in a cause of the office of the Judge promoted by *Thomas*

(1) The argument as reported has been necessarily confined to the proof of the heresies alleged in the Articles of Charge. The learned Counsel for the Appellant entered into an elaborate criticism of the judgment of the Dean of the Arches, and the various authorities from the writings of Divines, &c., referred to and relied on by that learned Judge. The learned Counsel's argument having been printed *in extenso*, and published (Lond. 8vo. 1872, *Rivington's*, pp. 310), that portion of it has been omitted here.

Byard Sheppard, the Appellant, against the Rev. *William James Early Bennett*, Vicar of the Parish of *Frome Selwood*, in the Diocese of *Bath and Wells*, the Respondent, for having offended against the Laws Ecclesiastical by having, within two years from the date of the institution of the cause, caused to be printed and published certain Works, in which he is alleged to have advisedly maintained or affirmed, doctrines directly contrary or repugnant to the Articles and Formularies of the United Church of *England* and *Ireland*, in relation to the Sacrament of the Lord's Supper, such Works being entitled respectively "Some Results of the Tractarian Movement of 1833," forming one of the essays contained in a volume entitled "The Church and the World," edited by the Rev. *Orby Shipley*, Clerk, printed and published in *London* in the year 1867; "A Plea for Toleration in the Church of *England*, in a Letter addressed to the Rev. *E. B. Pusey*, D.D., Regius Professor of Hebrew, and Canon of *Christ Church, Oxford*, 2nd edition," printed and published in *London* in the year 1867; and "A Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*, D.D., Regius Professor of Hebrew, and Canon of *Christ Church, Oxford*, 3rd edition," printed and published in *London* in the year 1868.

The cause was instituted in the Arches Court of *Canterbury* by virtue of Letters of Request of the late Lord Bishop of *Bath and Wells*, in accordance with the provisions of the Act, 3 & 4 Vict. c. 86.

The Respondent was duly cited on the 26th of July, 1869.

No appearance was given to the Citation, and in default of appearance Articles were filed in accordance with the practice of the Court.

On the 30th of October, 1869, the Judge, having previously heard Counsel on behalf of the Appellant, directed the Articles to be reformed, by omitting such parts thereof as charge the Respondent with contravening the 29th Article of Religion, entitled "Of the Wicked which eat not the Body of Christ in the use of the Lord's Supper."

From such Decree or Order a petition of appeal was presented, with the permission of the Judge, and the appeal came before the Judicial Committee of the Privy Council on the 26th of March, 1870 (1), when the Lords of the Committee, having heard Counsel

(1) *Ante*, p. 350.

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on behalf of the Appellant, agreed to report to Her Majesty their opinion against the appeal, and that the Decree or Order appealed from ought to be affirmed, and the cause remitted, with all its incidents, to the Judge of the Court from which the same was appealed.

An Order in Council, confirming the Report of the Judicial Committee, was afterwards made.

The cause was accordingly remitted to the Arches Court of *Canterbury*, and on the 3rd of June, 1870, in default of appearance on the part of the Respondent, the Judge of the Court, having heard Counsel on behalf of the Appellant, himself reformed the Articles and admitted the same as so reformed, notwithstanding that the Counsel for the Promoter objected to the reformation of the Articles so made by the Judge, as being at variance with, and exceeding, the reformation directed by the Order of the 30th of October, 1869.

On the 16th of June, 1870, the cause came on for hearing, and an application was then made by Counsel that the passages in the 5th, 6th, 7th, and 32nd Articles, which had been struck out by the Judge in his reformation of the Articles, on the 3rd of June, might be reinstated. The Judge, however, made no further Order thereon, and the hearing of the cause was continued.

On the 23rd of July, 1870, the Judge, by his Interlocutory Decree, having the force and effect of a definite Sentence in writing, pronounced that the Proctor for the Appellant had failed in sufficiently proving the Articles, and dismissed the Respondent from the suit.

The present appeal is from so much of the Interlocutory Decree or Order of the 3rd of June, 1870, as in effect directs the passages in the 5th, 6th, 7th, and 32nd Articles to be struck out; also from the Interlocutory Decree or Order of the 16th of June, 1870, whereby, in effect, the Judge declined to allow such passages to be reinstated, and from the final Sentence or Decree of the 23rd of July, 1870.

The Respondent has not appeared upon the hearing of the appeal, and the Court has not had that assistance from the argument of Counsel in his behalf which is especially desirable in cases like the present, where the Committee are called upon to advise

Her Majesty on matters of grave importance as a Tribunal of ultimate appeal.

The Counsel for the Appellant first opened the appeal from the Interlocutory Order of the Judge of the 3rd of June, 1870, whereby he adhered to the reformation that he had made in the 5th, 6th, 7th, and 32nd Articles of charge.

With regard to the reformation of the Articles, the course originally taken seems to be sanctioned by usage; but it appears to their Lordships to be a course attended with considerable inconvenience, and one which might lead to great delay, if not to a miscarriage.

The original Decree of the Arches Court directed the Articles of charge to be reformed, by omitting all such parts thereof as charged the Respondent with contravening the 29th Article of Religion, and this Decree was affirmed on appeal, on the recommendation of this Committee.

The form of the Decree leaves open to further determination by the Court what parts of the Articles of charge, do, in effect, charge the Respondent with contravening the 29th Article of Religion, and thus opens the door to further discussion, and, as in this case, to a further appeal. In the meantime the Judge himself strikes out such parts of the Articles of charge as he conceives to be within the previous Decree of the Court, and then proceeds to hear the cause with the record so altered. If he should have erroneously struck out parts not affected by the Decree, the attention of the Accused, in his answer or evidence, will not have been called to the parts struck out, for he would be entitled to consider them as no longer forming part of the charge; but if the Promoter, on appeal, should succeed in restoring the passages in question, it would obviously become necessary to allow the Respondent an opportunity of meeting the restored charges.

In the present case their Lordships have thought it best to allow the Appellant to conduct his argument as if the passages which he avers should not have been struck out still remained part of the record, and to found any argument upon such passages as he might be advised, provided the argument did not seek to establish a contravention by the Respondent of the 29th Article of Religion.

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But their Lordships think it right to observe, that it would be proper, in future, that before any appeal be presented to Her Majesty in Council, in respect of a Decree directing the reformation of Articles of charge or other pleadings, the actual reformation which appears to the Judge to be required, should be made by him on the face of the Decree, so that on appeal the very passages omitted should be clearly brought under the judgment of this Committee, instead of a Decree directing, by general reference, the nature of the alteration required.

On proceeding to the consideration of the appeal from the final Decree of the Court of Arches, there is one point which was prominently brought forward in the opening of the case by the Counsel for the Appellant, which it appears to their Lordships may be separately disposed of.

The Articles of charge set forth several passages from the 2nd and 3rd editions of a work published by the Respondent, called "A Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*." Now the 2nd edition of this work was published in 1867, and the 3rd edition in 1868. The 3rd edition contains important corrections of expressions in the 2nd edition, which expressions form part of the charge against the Respondent. The original expressions and their correction are fairly stated and set forth by the Appellant in the 7th Article of charge. The learned Judge, in the Court below, has stated that he has no doubt that the expressions originally used by the Respondent, viz., "the real Actual and Visible Presence of the Lord upon the Altars of our Churches," and again, "Who myself adore and teach the people to adore the Consecrated Elements, believing Christ to be in them—believing that under their veil is the sacred Body and Blood of our Lord and Saviour Jesus Christ," "contravened the plain and clear intent of the Formularies of the Church." And the learned Judge has also set forth the alterations of these statements made in the 3rd edition of the Respondent's Work, and on the passages so altered, has found that the Respondent has not been guilty of a contravention of the Articles as alleged by the Promoter. Mr. *Bennett's* own words, in adopting the altered words, are as follows:—"My meaning and that which passed through my mind in writing the original passages was precisely the

same as that which is now conveyed in the words substituted, but as the original words were liable to a different construction from that in which I used them, I, therefore, most willingly, in this edition, adopt another formula to express my meaning." The learned Judge has regretted that these alterations made by Mr. *Bennett* in his 3rd edition are unaccompanied by any expression of regret or self-reproach on the Respondent's part, for the mischief which his crude and rash expressions have caused. Their Lordships feel obliged to adopt the censure of the learned Judge on this point.

Upon this state of facts the learned Counsel urged, that there had been no retractation of the original use, and that, in default of actual retractation, the learned Judge should have condemned the Respondent in respect of the words used by him in the 2nd edition of his Work, though varied by the substituted words in the 3rd edition, and he cited several authorities for the purpose of supporting this argument.

But, without regarding the Respondent's language as a retractation, their Lordships think, that it is competent for them to take into consideration any explanation that an accused person may give of the language used by him, and to determine, whether such explanation is made *bonâ fide* and is entitled to credit. They attach great importance to the fact that the 3rd edition was published before suit, and they think that they may accept his later words as the more correct expression of the Respondent's meaning.

In proceeding to consider the substance of the charges against the Respondent, their Lordships think it desirable to recall to mind the principles on which former decisions in similar cases have proceeded.

In the cases of *Williams* v. *The Bishop of Salisbury* and *Wilson* v. *Fendell* (1), their Lordships laid down as follows:—

"These prosecutions are in the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation. The Articles of charge must distinctly state the opinions which the Clerk has advisedly maintained, and set forth the passages in which those opinions are stated; and further the Articles must specify the doctrines of the Church which such

(1) 2 Moore's P. C. Cases (N.S.) 423.

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opinions or teaching of the Clerk are alleged to contravene, and the particular Articles of Religion or portions of the Formularies which contain such doctrines. The Accuser is, for the purpose of the charge, confined to the passages which are included and set out in the Articles as the matter of the accusation; but it is competent to the accused party to explain from the rest of his Work the sense or meaning of any passage or word that is challenged by the Accuser."

So in the judgment in the *Gorham Case*—

"The question which we have to decide is, not whether the opinions are theologically sound or unsound—not whether upon some of the doctrines comprised in the opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious Ministers of the Church; but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of *England*, by its Articles, Formularies, and Rubrics, requires to be held by its Ministers, so that upon the ground of those opinions the Appellant can lawfully be excluded from the benefice to which he has been presented." "This question must be decided by the Articles and the Liturgy; and we must apply to the construction of those Books the same rules which have been long established, and are by law applicable to the construction of all written instruments. We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed." (1). . . . . "There were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them, or by the authorities by which they may be supposed to have been influenced, or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy, as we now have them, must be considered as the final result of the

(1) Moore's Special Rep. of the *Gorham Case*, Lond. 1852, p. 462.

discussion which took place;—not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected (1)." . . . . "This Court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any case to be the doctrine of the Church of *England*. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of *England* upon the true and legal construction of the Articles and Formularies" (2).

Lord *Stowell* had long before said in the case of *The King's Proctor* v. *Stone* (3), "If any Article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them."

To the principles thus laid down their Lordships will adhere in the present case.

The attention of the Court has been directed to the successive revisions of the Book of Common Prayer, and to alterations or omissions which have been made in it at different times. Changes by which words or passages inculcating particular doctrines, or assuming a belief in them, have been struck out, are most material as evidence that the Church has deliberately ceased to affirm those doctrines in her public services. At the same time it is material to observe, that the necessary effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, and not that it becomes unlawful to maintain them. In the public or common prayers and devotional offices of the Church all her members are expected and entitled to join; it is necessary, therefore, that such forms of worship as are prescribed by authority for general use should embody those

(1) Moore's Special Rep. of the *Gorham Case*, Lond. 1852, p. 463.
(2) Ibid. p. 472.
(3) 1 Hagg. Con. Rep. 429.

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beliefs only which are assumed to be generally held by members of the Church.

In the case of *Westerton* v. *Liddell* (1), and again in *Martin* v. *Mackonochie* (2), their Lordships say, "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be allowed." If the Minister be allowed to introduce at his own will variations in the rites and ceremonies that seem to him to interpret the doctrine of the service in a particular direction, the service ceases to be what it was meant to be, common ground on which all Church people may meet, though they differ about some doctrines. But the Church of *England* has wisely left a certain latitude of opinion in matters of belief, and has not insisted on a rigorous uniformity of thought which might reduce her communion to a narrow compass.

Dealing only with the 3rd edition of the Respondent's Work, and having regard to their former decision, that the charge of contradicting the 29th Article of Religion as to reception by the wicked should be struck out, their Lordships may consider the remaining charges against the Respondent under three heads:—

1. As to the Presence of Christ in the Holy Communion.
2. As to Sacrifice in the Holy Communion.
3. As to Adoration of Christ present in the Holy Communion.

The Respondent is charged with maintaining under these three heads the following propositions:—

First, that in the Sacrament of the Lord's Supper there is an actual Presence of the true Body and Blood of our Lord in the consecrated Bread and Wine, by virtue of and upon the consecration, without or external to the Communicant, and irrespective of the faith and worthiness of the Communicant, and separately from the act of reception by the Communicant; and it was contended by Counsel under this head that the true Body of Christ meant the natural Body.

Second, that the Communion Table is an Altar of Sacrifice, at which the Priest appears in a sacerdotal position at the celebration

(1) Moore's Special Rep., Lond. 1857, p. 187.
(2) Law Rep. 2 P. C. 383.

of the Holy Communion, and that at such celebration there is a great sacrifice or offering of our Lord by the ministering Priest, in which the Mediation of our Lord ascends from the Altar to plead for the sins of men.

Third, that adoration is due to Christ present upon the Altars or Communion Tables of the Churches, in the Sacrament, under the form of Bread and Wine, on the ground that under their veil is the Body and Blood of our Lord.

The several positions so maintained are averred, each and all, to be repugnant to the doctrines of our Church, as set forth in the Articles and Formularies in that behalf specially alleged.

Their Lordships are bound to consider, in the first place, what has been affirmed, and what has been denied, in reference to the doctrine to which these three statements relate.

The 4th Article of Religion affirms:—

1. That "Christ did truly rise again from death, and took again His Body, with flesh, bones, and all things appertaining to the perfection of Man's nature; wherewith He ascended into Heaven, and there sitteth, until He return to judge all men at the Last Day."

In the 28th Article of Religion it is affirmed:—

(1.) "The Supper of the Lord is not only a sign of the love that Christians ought to have among themselves one to another; but rather is a Sacrament of our Redemption by Christ's death: insomuch that to such as rightly, worthily, and with faith, receive the same, the Bread which we break is a partaking of the Body of Christ; and likewise the Cup of Blessing is a partaking of the Blood of Christ.

(2.) "Transubstantiation (or the change of the substance of Bread and Wine) in the Supper of the Lord, cannot be proved by Holy Writ; but is repugnant to the plain words of Scripture, overthroweth the nature of a Sacrament, and hath given occasion to many superstitions.

(3.) "The Body of Christ is given, taken, and eaten in the Supper only after an heavenly and spiritual manner. And—

(4.) "The mean whereby the Body of Christ is received and eaten in the Supper is faith.

(5.) "The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

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By the 29th Article of Religion it is affirmed :—

(6.) "The Wicked, and such as be void of a lively faith, although they do carnally and visibly press with their teeth (as St. *Augustine* saith) the Sacrament of the Body and Blood of Christ, yet in no wise are they partakers of Christ: but rather to their condemnation, do eat and drink the sign or sacrament of so great a thing."

By the 31st, it is affirmed :—

(7.) "The Offering of Christ once made is that perfect redemption, propitiation, and satisfaction, for all the sins of the whole world, both original and actual; and there is none other satisfaction for sin, but that alone. Wherefore—

(8.) "The sacrifices of Masses, in the which it was commonly said, that the Priest did offer Christ for the quick and the dead, to have remission of pain or guilt, were blasphemous fables and dangerous deceits."

(9.) In the Catechism it is stated that "the Body and Blood of Christ are verily and indeed taken and received by the faithful in the Lord's Supper."

Their Lordships proceed, with these passages before them, to examine the charges made against the Respondent. The first relates to the presence of the Body and Blood of Christ in the Holy Communion.

The Church of *England*, in the passages just cited, holds and teaches affirmatively that in the Lord's Supper the Body and Blood of Christ are given to, taken, and received by the faithful Communicant. She implies, therefore, to that extent, a Presence of Christ in the Ordinance to the soul of the worthy recipient. As to the mode of this Presence she affirms nothing, except that the Body of Christ is "given, taken, and eaten in the Supper only after an heavenly and spiritual manner," and that "the mean whereby the Body of Christ is received and eaten is faith." Any other Presence than this—any Presence which is not a Presence to the soul of the faithful receiver—the Church does not by her Articles and Formularies affirm, or require her Ministers to accept. This cannot be stated too plainly. The question is, however, not what the Articles and Formularies affirm, but what they exclude. The Respondent maintains a Presence which is (to use his own expression) "real, actual, objective," a Presence in the Sacrament, a Presence upon

the Altar, under the form of Bread and Wine. He does not appear to have used the expression "in the Consecrated Elements," in his 3rd edition; this is one of the points on which the language of the 2nd edition was altered. And the question raised by the appeal is, whether his position is contradictory or repugnant to anything in the Articles or Formularies, so as to be properly made the ground of a criminal charge.

Setting aside the Declaration at the end of the Communion Office, which will be presently considered, we find nothing in the Articles and Formularies to which the Respondent's position is contradictory or repugnant.

The statement in the 28th Article of Religion that the Body of Christ is given, taken, and eaten in the Lord's Supper "only after an heavenly and spiritual manner," excludes undoubtedly any manner of giving, taking, or receiving which is not heavenly or spiritual. The assertion of a "real, actual, objective" Presence, introduces, indeed, terms not found in the Articles or Formularies; but it does not appear to affirm, expressly or by necessary implication, a Presence other than spiritual, nor to be necessarily contradictory to the 28th Article of Religion.

The 29th Article of Religion, which is entitled "Of the Wicked which eat not the Body of Christ in the use of the Lord's Supper," and which affirms that the wicked and such as be void of a lively faith "are in no wise partakers of Christ," may suggest, indeed, an inference unfavourable to the Respondent's statements, but cannot be said to be plainly contradictory of them or necessarily to exclude them. The two propositions, that the faithful receive Christ in the Lord's Supper, and that the wicked are in no wise partakers of Christ, when taken together, do not appear to be contradicted by the statement that there is a real, actual, and objective Presence of the Body and Blood of Christ in the Sacrament after a heavenly and spiritual manner.

The "Declaration of Kneeling" should now be considered. It is as follows:—

"Whereas it is ordained in this Office for the Administration of the Lord's Supper, that the Communicants should receive the same kneeling; (which order is well meant, for a signification of our humble and grateful acknowledgment of the benefits of Christ

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therein given to all worthy Receivers, and for the avoiding of such profanation and disorder in the Holy Communion, as might otherwise ensue;) yet, lest the same kneeling should by any persons, either out of ignorance or infirmity, or out of malice and obstinacy, be misconstrued and depraved; It is hereby declared, that thereby no adoration is intended, or ought to be done, either unto the Sacramental Bread or Wine there bodily received, or unto any Corporal Presence of Christ's natural Flesh and Blood. For the Sacramental Bread and Wine remain still in their very natural substances, and therefore may not be adored; (for that were Idolatry, to be abhorred of all faithful Christians;) and the natural Body and Blood of our Saviour Christ are in Heaven, and not here; it being against the truth of Christ's natural Body to be at one time in more places than one."

This Declaration originally appeared in the second Prayer Book of *Edward* VI., A.D. 1552, in which book the position of kneeling was positively enjoined upon those who received the Sacrament. It was issued by the King, and was ordered by the Council to be appended to the Prayer Book, but after the Book had received the sanction of Parliament, so that it was not of statutory authority. From the Prayer Book of *Elizabeth* (1559) the Declaration was omitted. In 1662 it was inserted in the present Prayer Book, and became of equal authority with the rest of the Prayer Book. The form of the Declaration was somewhat altered; the words "Unto any real and essential presence there being of Christ's natural Flesh and Blood" were altered to "unto any corporal presence of Christ's natural Flesh and Blood, and the words "true natural Body" became "natural Body."

It was urged for the Appellant that, since the Church recognises only one Body of Christ, the natural and now glorified Body which is spoken of in the 4th Article of Religion, and since the Declaration asserts that this Body is "in Heaven and not here," the only presence in the Sacrament which can be held consistently with the Declaration is a presence to the soul of the communicant.

It was insisted that the word "natural" applied to the Body of Christ can convey no additional meaning, unless it be used to distinguish the true Body of Christ, which is His natural Body, from the Church, which is His Body in a mystical or figurative sense;

and that the expression "corporal presence" cannot mean a presence in the manner or under the conditions in and under which material bodies are present or exist in space; that it must mean or include any presence whatever in the Elements, as contradistinguished from a presence to the spiritual apprehension of the receiver. There can be no question, it was argued, as to the mode or manner of the Presence; for no mode or manner of Presence is conceivable which would reconcile the proposition that the true Body of Christ is in the Elements with the proposition that the natural Body is in Heaven, and not here.

Their Lordships are of opinion that these inferences, whether probable or not, are by no means of that plain and certain character which the conclusion they are asked to draw from them requires. The matters to which they relate are confessedly not comprehensible, or very imperfectly comprehensible, by the human understanding; the province of reasoning as applied to them is therefore very limited; and the terms employed have not, and cannot have, that precision of meaning which the character of the argument demands. Concerning the mode of reception of the Body and Blood of Christ by the faithful Communicant, the Church affirms nothing more than that it is heavenly and spiritual and that the mean whereby we receive is faith.

Nor can their Lordships accede to the argument that the words "Corporal Presence of Christ's natural Flesh and Blood" must be understood as the Appellant understands them, and the phrase "Corporal Presence" regarded merely as an equivalent for the different expression in lieu of which it was substituted. On the contrary, it is at the least probable that, as the Declaration itself was introduced in order to conciliate scruples in one quarter, the alteration made in it was designed to remove objections entertained against it in another.

Their Lordships could not advise the condemnation of a Clergyman for maintaining that the use in 1662 of the word "corporal" instead of the words "real and essential" in the Declaration of Kneeling was an intentional substitution, implying that there may be a real or essential Presence as distinguished from a corporal Presence.

The Respondent has nowhere alleged in terms a corporal Pre-

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sence of the natural Body of Christ in the Elements; he has never affirmed that the Body of Christ is present in a "corporal" or "natural" manner. On the contrary, he has denied this, and he speaks of the Presence in which he believes as "spiritual," "supernatural," "sacramental," "mystical," "ineffable."

II. The next charge against the Respondent is, that he has maintained that the Communion Table is an Altar of Sacrifice, at which the Priest appears in a sacerdotal position at the celebration of the Holy Communion, and that at such celebration there is a great sacrifice or offering of our Lord by the ministering Priest, in which the mediation of our Lord ascends from the Altar to plead for the sins of men.

The Church of *England* does not by her Articles or Formularies teach or affirm the doctrine maintained by the Respondent. That she has deliberately ceased to do so would clearly appear from a comparison of the present Communion Office with that in King *Edward's* First Prayer Book, and of this again with the Canon of the Mass in the *Sarum* Missal.

This subject was fully discussed before their Lordships in *Westerton* v. *Liddell*, when it was decided that the "change in the view taken of the Sacrament naturally called for a corresponding change in the ancient Altar. It was no longer to be an Altar of Sacrifice, but merely a Table at which the Communicants were to partake of the Lord's Supper" (1).

The 31st Article of Religion, after laying down the proposition (which is adopted also, in words nearly the same, in the Prayer of Consecration), that "the Offering of Christ once made is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual," and that "there is none other satisfaction for sin, but that alone," proceeds, on the strength of these propositions, to say that "the sacrifices of Masses, in the which it was commonly said that the Priest did offer Christ for the quick and the dead to have remission of pain or guilt, were blasphemous fables and dangerous deceits."

It is not lawful for a Clergyman to contradict, expressly or by inference, either the proposition which forms the first part of this

(1) Moore's Special Rep., Lond. 1857, p. 181.

Article, or any proposition plainly deducible from the condemnation of propitiatory masses which forms the second part of it, and is stated as a corollary to the first.

It is not lawful for a Clergyman to teach that the Sacrifice or offering of Christ upon the Cross, or the redemption, propitiation, or satisfaction, wrought by it, is or can be repeated in the Ordinance of the Lord's Supper; nor that in that Ordinance there is or can be any Sacrifice or Offering of Christ which is efficacious, in the sense in which Christ's death is efficacious, to procure the remission of the guilt or punishment of sins.

It is well known, however, that by many Divines of eminence the word "sacrifice" has been applied to the Lord's Supper in the sense not of a true propitiatory or atoning Sacrifice, effectual as a satisfaction for sin, but of a rite which calls to remembrance and represents before God that one true Sacrifice. To take one example, Bishop *Bull* says:—

"In the Eucharist then Christ is offered, not hypostatically, as the *Trent* Fathers have determined, for so He was but once offered, but commemoratively only; and this commemoration is made to God the Father, and is not a bare remembering or putting ourselves in mind of Him. For every Sacrifice is directed to God, and the oblation therein made, whatsoever it be, hath Him for its object, and not man. In the Holy Eucharist, therefore, we set before God the Bread and Wine, 'as figures or images of the precious Blood of Christ shed for us, and of His precious Body' (they are the very words of the Clementine Liturgy), and plead to God the merit of His Son's Sacrifice once offered on the Cross for us sinners, and in this Sacrament represented, beseeching Him for the sake thereof to bestow His heavenly blessings on us."—*Bull's* Works, vol. ii., p. 22.

The distinction between an act by which a satisfaction for sin is made, and a devotional rite by which the satisfaction so made is represented and pleaded before God, is clear, though it is liable to be obscured, not only in the apprehension of the ignorant, but by the tendency of Theologians to exalt the importance of the rite till the distinction itself well nigh disappears. To apply the word "sacrifice" in the sense in which Bishop *Bull* has used it to the ordinance of the Lord's Supper, though it may be liable to abuse

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and misapprehension, does not appear to be a contravention of any proposition legitimately deducible from the 39th Article. It is not clear to their Lordships that the Respondent has so used the word "sacrifice" as to contradict the language of the Articles.

III. Their Lordships now proceed to the third charge, which relates to the adoration of Christ present in the Sacrament.

The 20th and 27th Articles of charge contain the false doctrines alleged to be held by Mr. *Bennett*. The 20th charges that he affirms the doctrine that adoration or worship is due to the consecrated Bread and Wine.

The 27th, that he affirms that adoration is due to Christ present upon the Altars of our Churches in the Sacrament of the Holy Communion, under the form of Bread and Wine, on the ground that under their veil is the Sacred Body and Blood of our Lord (the passages referred to for proof are set out in the 7th Article).

The 31st Article charges that these doctrines are contrary to the 28th Article of Religion, and the Declaration on Kneeling.

The passages relied on as the ground of these charges are the following:—

"The reader will observe that in the two first editions, at page 3, the words were: '*The real actual and visible Presence of our Lord upon the Altars of our Churches.*' In the present edition he will find, at page 2, the following words substituted: '*The real and actual Presence of our Lord under the form of Bread and Wine upon the Altars of our Churches.*' He will also observe that, at page 14 in the former editions, the words were:—'*Who myself adore and teach the People to adore the consecrated Elements, believing Christ to be in them—believing that under their veil is the sacred Body and Blood of my Lord and Saviour Jesus Christ.*' He will now find the following words substituted:—'*Who myself adore and teach the people to adore Christ present in the Sacrament, under the form of Bread and Wine, believing that under their veil is the sacred Body and Blood of my Lord and Saviour Jesus Christ.*'"

"The three great doctrines on which the Catholic Church has to take her stand are these:—I. The Real Objective Presence of our Blessed Lord in the Eucharist; II. 'The sacrifice offered by the Priest;' and III. The adoration due to the Presence of our Blessed Lord therein."

"Well, I do not know what others of my brethren in the Priesthood may think—I do not wish to compromise them by anything that I say or do—but seeing that I am one of those who burn lighted candles at the Altar in the daytime; who use incense at the Holy Sacrifice; who use the Eucharistic Vestments; who elevate the Blessed Sacrament; who myself adore and teach the people to adore Christ present in the Sacrament, under the form of Bread and Wine; believing that under their veil *is the sacred Body and Blood of my Lord* and Saviour Jesus Christ;—seeing all this it may be conceived that I cannot rest very much at ease under the imputations above recited."

Their Lordships agree with the learned Judge of the Court below, that the doctrine charged in the 20th Article, namely, that adoration is due to the Consecrated Elements, is contrary to Law, and must be condemned. But they have admitted, as the learned Judge has done, Mr. *Bennett's* explanation of that language, and therefore they are not called upon to condemn Mr. *Bennett* under the 20th Article. The 27th Article of charge therefore alone remains for decision; it is as follows:—

"That in or by the passages lettered N, O, and S, hereinbefore set forth in the 7th preceding Article, you have maintained or affirmed and promulgated the doctrine that adoration is due to Christ, present upon the Altars (thereby referring to the Communion Tables) of the Churches of the said United Church of *England* and *Ireland* in the Sacrament of the Holy Communion, under the form of Bread and Wine, on the ground that under their veil is the sacred Body and Blood of our Lord and Saviour Jesus Christ."

Their Lordships have now to consider whether or not the passages from the Respondent's writings above set forth are necessarily repugnant to or contradictory of the 28th Article of Religion, or of the Declaration of Kneeling, as alleged in the 31st Article of charge.

The Declaration of Kneeling states that, by the direction that the Communicants shall receive the Consecrated Elements kneeling, "no adoration is intended or ought to be done, either to the Sacramental Bread and Wine there bodily received, or to any corporal presence of Christ's natural Flesh and Blood."

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According to this declaration, neither the elements nor any corporal presence of Christ therein ought to be adored.

The 28th Article lays down that "the Sacrament of the Lord's Supper was not by Christ's ordinance, reserved, carried about, lifted up, or worshipped."

In the 25th Article it had been affirmed that "the Sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them."

It was laid down in *Martin* v. *Mackonochie* that such acts as the elevation of the Cup and Paten, and kneeling and prostration of the Minister before them, were unlawful, because they were not prescribed in the Rubric of the Communion Office, and because acts not prescribed were to be taken as forbidden. Their Lordships in that judgment adopted the words of the Committee in *Westerton* v. *Liddell;* "for the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted."

It follows, then, that the Church of *England* has forbidden all acts of adoration to the Sacrament, understanding by that the Consecrated Elements. She has been careful to exclude any act of adoration on the part of the Minister at or after the consecration of the Elements, and to explain the posture of kneeling prescribed by the Rubric. If the charge against Mr. *Bennett* were that he had performed an outward act of adoration on any occasion in the service, the principles laid down in *Martin* v. *Mackonochie* would apply to this case. Such an act could not be done except in the service, because the Sacrament may not be "reserved." But even if the Respondent's words are a confession of an unlawful act it is questionable whether such a confession would amount to false doctrine. And it is also fair to remember, in the Respondent's favour, that the judgment in the case of *Martin* v. *Mackonochie*, which established the unlawfulness of introducing acts of adoration, was not delivered until the 23rd of December, 1868, after the publication of the words that are now impugned. Some of their Lordships have doubted whether the word "adore," though it seems to point rather to acts of worship, such as are forbidden by the 28th Article, may not be construed to refer to mental adora-

tion, or prayers addressed to Christ present spiritually in the Sacrament, which does not necessarily imply any adoration of the Consecrated Elements or of any corporal or natural presence therein.

Upon the whole, their Lordships, not without doubts and division of opinions, have come to the conclusion that this charge is not so clearly made out as the rules which govern penal proceedings require. Mr. *Bennett* is entitled to the benefit of any doubt that may exist. His language has been rash, but as it appears to the majority of their Lordships that his words can be construed so as not to be plainly repugnant to the two passages articled against them, their Lordships will give him the benefit of the doubt that has been raised.

Their Lordships having arrived at the conclusion that they must advise Her Majesty that the appeal must be dismissed, feel bound to add that there is much in the judgment of the learned Judge in the Court below with which they are unable to concur. The learned Judge has endeavoured to settle by a mass of authorities what is the doctrine of the Church of *England* on the subject of the Holy Communion. It is not the part of the Court of Arches, nor of this Committee, to usurp the functions of a Synod or Council. Happily their duties are much more circumscribed, namely, to ascertain whether certain statements are so far repugnant to, or contradictory of, the language of the Articles and Formularies, construed in their plain meaning, that they should receive judicial condemnation.

Their Lordships will not attempt to examine in detail the catena of authorities which the Judge of the Arches has brought together, nor that of the learned Counsel who appeared for the Appellant. No mode of argument is more fallacious on a subject so abstruse and of so many aspects: short extracts, even where candidly made, as in this case, give no fair impression of an author's mind. Thus Dean *Jackson* is quoted in the judgment; but the quotation omits the preceding sentence (1) which gives to the whole passage a meaning difficult to reconcile with the purpose for which it is used; while the opinion of this eminent Divine would have been more correctly represented by referring also to the

(1) Works, vol. x. p. 41.

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following remarkable passage in a previous chapter of his work: "What need then is there of His bodily Presence in the Sacrament, or of any other Presence than the influence or emission of virtue from His heavenly sanctuary into our souls? He has left us the Consecrated Elements of Bread and Wine, to be unto us more than the hem of His garment. If we do but touch and taste them with the same faith by which this woman touched the hem of His garment, our same faith shall make us whole" (1). Several of those who are cited by the learned Judge are living persons of greater or less note, who cannot rank as authorities for the history of a great controversy.

One of the authorities is so questionable, that it requires a passing examination. The learned Judge, after quoting the 28th Article of Religion, introduces as "a '*contemporanea expositio*,' from the Compiler of this Article, which cannot, I think be gainsaid," a Letter from Bishop *Gheast* to *Cecil*, under the date 1556 (probably a mistake for 1566), explaining the sense which he put upon the word "only" in the 28th Article. *Gheast* does not say that he was the "Compiler" of the 28th Article, all but one sentence of which had been in substance in the Articles of 1552; and the context shews that he used the word "Article" only of this sentence, which, he says, was "of mine own penning." Upon the faith of this Letter, genuine or not, avowedly written for a personal purpose ("for mine own purgation") is founded an exposition of the words "only after an heavenly and spiritual manner," as meaning that though a man "took Christ's Body in his hand, received it with his mouth, and that corporally, naturally, really, substantially, and carnally . . . . yet did he not for all that see it, feel it, smell it, nor taste it." Upon this alleged exposition their Lordships feel themselves free to observe that the words "only after an heavenly and spiritual manner," do not appear to contain or involve the words "corporally, naturally, and carnally," but to exclude them; and that it is the Article, and not the questionable comments of a doubtful Letter written for personal motives, which is binding on the Clergy and on this Court.

Their Lordships recall once more, in acknowledging the learning that has been brought to bear upon this case, the principle which

(1) Works, vol. ix. p. 611.

this Committee has long since laid down. "There were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them, or by the authorities by which they may be supposed to have been influenced; or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy, as we now have them, must be considered as the final result of the discussion which took place; not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected" (1).

Citations from established Authors may be of use to shew that "the liberty which was left by the Articles and Formularies has been actually enjoyed and exercised by the members and Ministers of the Church of England" (2). But, to say the least, very few of the quotations in the judgment exhibit the same freedom of language as do the extracts from Mr. *Bennett*. And after every authority had been examined, there would still remain the question that is before this Committee, whether the licence or liberty is really allowed by the Articles and Formularies—whether anything has been said by the Respondent which plainly contradicts them. If the Respondent had made statements contradicting the Articles or Formularies, the citation of great names would not have protected him; if he has not done so, he is safe without their protection.

There is one passage in the judgment which seems especially to call for comment:—

"With respect to the second and corrected edition of his Pamphlet, and the other work for which he is articled, I say that the objective, actual, and real Presence, or the spiritual, real Presence, a Presence external to the act of the Communicant, appears to me to be the doctrine which the Formularies of our Church, duly considered and construed so as to be harmonious, intended to maintain. But I do not lay down this as a position of law, nor do I say that

(1) Judgment of Privy Council, *Gorham Case*, by *E. F. Moore*, Lond. 1852, p. 462.
(2) Ibid. p. 474.

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what is called the receptionist doctrine is inadmissible; nor do I pronounce on any other teaching with respect to the mode of presence. I mean to do no such thing by this judgment. I mean by it to pronounce only that to describe the mode of Presence as objective, real, actual, and spiritual, is certainly not contrary to the law" (1).

Their Lordships regret that the learned Judge should have put forth this extra-judicial statement, in which he adopts words that are not used in the Articles or Formularies as expressing their doctrine. The word "receptionist" is as foreign to the Articles as the word "objective." Their Lordships have already said that any Presence which is not a Presence to the soul of the faithful receiver, the Church does not by her Articles and Formularies affirm. They need not ask whether there is really any doubt as to the admissibility of the doctrine of *Hooker* and *Waterland*, who appear to be described as "Receptionists," in the Church of which they have been two of the greatest ornaments.

Their Lordships have not arrived at their decision without great anxiety and occasional doubt. The subject is one which has always moved the deepest feelings of religious men, and will continue to do so. There might have been expected from a theologian dealing with this subject, if not a charitable regard for the feelings of others, at least a careful preparation and an exactness in the use of terms. The very Divine whose opinions Mr. *Bennett* seems to have sought to represent, was obliged himself to point out how erroneous was his statement of those opinions. The Respondent corrected the manifest error without an expression of regret at the pain he may have caused to many by his careless language. Even in their maturer form, his words are rash and ill-judged, and are perilously near a violation of the law. But the Committee have not allowed any feeling of disapproval to interfere with the real duty before them, to decide whether the language of the Respondent was so plainly repugnant to the Articles and Formularies as to call for judicial condemnation; and, as these proceedings are highly penal, to construe in his favour every reasonable doubt.

There will be no Order as to costs, as the Respondent has not appeared.

Proctors for the Appellant: *Mocre & Currey.*

(1) Law Rep. 3 A. & E. 284.

MOLLWO, MARCH, & CO. . . . . APPELLANTS; J. C.*

AND 1872

THE COURT OF WARDS . . . . . RESPONDENT. *July* 4, 5, 6.

ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM, IN BENGAL.

Partnership—Agreement with Firm for commission on net-profits and Interest—Cash advances.

Agreement in writing entered into between *W. & Co.*, British Merchants, carrying on business at *Calcutta* with a Hindoo *Rajah*, by which, in consideration of moneys already advanced, and which might be thereafter advanced by the *Rajah* to them, they agreed to carry on the business subject to the control of the *Rajah* in several particulars; stipulating that the *Rajah* should receive a commission of twenty *per cent.* on all profits made by the Firm, until the whole amount of the debt due to him should be paid off, with twelve *per cent.* interest upon all cash advances which had been, or might be thereafter, made by him to the Firm. Further advances having been made by the *Rajah* to the Firm, *W. & Co.* executed to him a mortgage of certain Tea plantations, to secure the then amount of his advances, and the *Rajah* by a Deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the *Rajah*, and though he was credited in the Books of the Firm with a considerable sum, that sum was never received by him, and was afterwards written back in the Books of the Firm. The *Rajah* did not interfere or exercise any such control in the business as to make him an ostensible Partner in the Firm:—*Held*, that, having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the Participant liable as a Partner to third parties, and looking at the whole scope of the Agreement, the primary object was to give security to the *Rajah* as a Creditor of the Firm of *W. & Co.*, and that the participation given him in the net profits of the business was not sufficient to establish a partnership between *W. & Co.* and the *Rajah*, as regarded third parties.

Although a right to participate in the profits of a Trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties.

The cases of *Cox* v. *Hickman* (1), and *Bullen* v. *Sharp* (2), referred to and acted on.

In the absence of any law or established custom existing in *India* in

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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respect to partnership transactions, the law of *England* is to be resorted to for principles and rules to guide the Courts. At the same time the usages of trade, and habits of business of the Indian community, so far as they may be peculiar or differ from those in *England*, are to be taken into consideration.

THIS was an appeal from a judgment of the High Court at *Fort William*, in *Bengal*, in favour of the Respondents, reversing the decree of the Principal *Sudder Ameen* of the 24 *Pergunnahs* made in favour of the Appellants.

The suit was brought by the Appellants, who were Merchants trading in *London*, against *Rajah Pertab Chunder Sing, Bahadoor*, as being jointly liable with the other persons trading as Merchants under the style of *Watson & Co.*, in *Calcutta*, in respect of the moneys due to the Appellants in certain transactions and dealings hereinafter mentioned. The *Rajah* having died after the commencement of the proceedings, the defence of the suit was continued on behalf of his representatives by the Court of Wards, the Respondents in the appeal.

The Appellants, before the transactions under which the suit arose, had carried on business as Merchants in *London*, and had had mutual dealings in trade with the Firm of *W. N. Watson & Co.*, of *Calcutta*. The dealings consisted in the Plaintiffs' Firm and the Firm of *W. N. Watson & Co.* mutually consigning goods and merchandize to each other for sale, and in the Firm of *W. N. Watson & Co.* drawing Bills of Exchange on the Appellants against the goods so consigned by them, which were paid by the Appellants in *London*, and in paying moneys on each other's account in the usual course of Merchants in correspondence with each other.

On the 19th of June, 1865, there was due to the Appellants from the Firm of *W. N. Watson & Co.* a balance of Rs.2,92,000. 2p. on the account current between the two Firms.

The business transactions between the two Firms were conducted under the partnership names, but the real question at issue between the parties was, whether or not the *Rajah* was jointly liable as a Partner with *W. N. Watson* and *T. O. Watson*, who were admitted to have been the Partners in the Firm of *W. N. Watson & Co.*, to pay the balance claimed, or any part thereof.

The issues in the suit, as settled by the Officiating Judge of the Court of the 24 *Pergunnahs*, were:

First, whether the Plaintiffs had dealings with the Firm of *W. N. Watson & Co.*, and what was the balance due to the Plaintiffs on such dealings and transactions from that Firm. Second, whether the *Rajah*, the then Defendant, was liable to the Plaintiffs as a Partner of the Firm of *W. N. Watson & Co.*; and if so, for what time? Third, being held to be a Partner, for what amount was the Defendant liable? whether for the whole, or only for a portion?

The Judge thought it more expedient to try the second issue first, and this course was accordingly pursued.

On the 30th of November, 1866, Mr. *J. Beaufort*, the Judge of the Court of the 24 *Pergunnahs*, by his judgment on this issue, found that the *Rajah* was a Partner of the Firm of *Watson & Co.*, and that his liability commenced on the 27th of August, 1863, and ceased on the 3rd of March, 1865. The other issues were subsequently tried, and by his judgment, dated the 10th of September, 1868, he found that the Appellants were entitled to recover in respect of all the items in the account current except two, which he disallowed for reasons stated in his judgment.

From this judgment an appeal was brought to the High Court of Judicature of *Bengal*, and a Division Bench, consisting of the Justices *Jackson* and *Markby*, reversed the judgment of the Court of the 24 *Pergunnahs*, holding that the *Rajah* was not liable as a Partner, or otherwise, to the Appellants for the balance or any part thereof; and from this judgment the present appeal was brought.

The circumstances under which the Appellants contended that the *Rajah* was liable were as follows:—

T. O. Watson and his Son, *W. N. Watson*, commenced trading in partnership in February, 1862, under the style of *W. N. Watson & Co.* They had but little capital, and finding themselves in want of money, applied to the *Rajah* to assist them. He assisted them during the year 1862 by acceptances, which the *Watsons* did not meet or provide for; the *Rajah* took them up, and was induced to advance further large sums of money. In January,

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1863, he retired an acceptance of Rs.10,000, and others in the following March to the extent of Rs.50,000. In April in that year he advanced Rs.10,000 to the Firm, and in the following August Rs.20,000. The business was, in fact, carried on mainly by the *Rajah's* capital.

On the 27th of August, 1863, an Agreement, in the following terms, was made between the *Watsons* and the *Rajah*, although not signed by the *Rajah*: "Memorandum of agreement made between *Rajah Pertab Chunder Sing, Bahadoor*, of *Pykeparrah*, in the suburbs of *Calcutta*, of the one part, and Messrs. *W. N. Watson & Co.*, of *Calcutta*, Merchants, of the other part.

"In consideration of certain sums of money already advanced, and which may hereafter be advanced by the *Rajah* to Messrs. *W. N. Watson & Co.*, and in consideration of his signing acceptances and other securities for the said *W. N. Watson & Co.*, it is hereby agreed as follows:—

"1st. Henceforth the said *W. N. Watson & Co.* shall not make any shipment without first obtaining the consent of *Rajah Pertab Chunder Sing*, so long as the said Firm shall remain in debt to the *Rajah*, and so long as the liabilities incurred by him in signing acceptances for the Firm, or any portion thereof, shall be in existence.

"2nd. Upon such shipments being made, the shipping documents shall be considered at the disposal of the said *Rajah Pertab Chunder Sing*, and that the said Firm shall not without his consent sell, pledge, or hypothecate them to any person or Bank, nor shall the Firm apply the proceeds thereof in payment of goods shipped without such consent.

"3rd. Remittances from home in the shape of goods will not be ordered by the Firm without the consent of the *Rajah*.

"4th. No consignment of goods shall be ordered from home by the Firm without the consent of the *Rajah* in writing.

"5th. All remittances received by the Firm from home, either in money, goods, or otherwise, shall be made over to the *Rajah*, and the same shall be under his control. The Firm shall sell the goods with the sanction of the *Rajah* first obtained, and all the proceeds shall, after meeting any debts of the Firm to other persons which the *Rajah* may deem urgent, be retained by the

Rajah to extinguish in part or in whole the Firm's debt to him, or extinguish wholly or in part the liabilities which he has so incurred as aforesaid; if the remittance be in consignment of the goods, all documents belonging to the same shall be handed over duly indorsed by the Firm to the *Rajah*, and the same shall be wholly at his disposal for the purpose of extinguishing the said debt and liability, subject only to the limitations just above mentioned.

"6th. The proceeds of the sale of any goods consigned free to the Firm shall also be made over to the *Rajah*, and the proceeds shall be remitted to the consignors with the sanction of the *Rajah*.

"7th. With regard to the conducting of the office business of the Firm in detail, the *Rajah* is to be consulted, and he may direct a reduction or enlargement of the establishment according as he may deem proper.

"8th. No moneys shall be drawn from the Firm for the private expenses of any member thereof, or for the conducting of business of the Firm, except such sums as the said *Rajah* shall agree to.

"9th. The *Rajah* shall have free access to all Books, Bills, documents, letters, advices, correspondences, and other papers belonging to the Firm or relating to its business.

"10th. In consideration of the said advances made, and the liability incurred as aforesaid by the *Rajah*, and in consideration of any future advances which may be made by him, the Firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the Firm from time to time, commencing from the 1st of May, 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished.

"11th. As security to the said *Rajah* for the advances he has made, or which he may hereafter make, and the liability which he has incurred in signing acceptances for the benefit of the said Firm, the Firm hereby makes over to him the title deeds of their tea plantations at *Cachon*, called *Jeffer Coon Baljore Kishnapore*, *East Bodreepaul*, *Central Buddreeparr*, and *West Buddreeparr*, and the Firm hereby agrees not to alienate the said plantations until the debts due by them to the *Rajah* are paid off and his said

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liabilities extinguished, when the said *Rajah* is to return the said title deeds to the Firm.

"12th. As further security to the *Rajah*, the Firm agree that their other property, landed or otherwise, including their present and future stock-in-trade and outstandings, shall be answerable for the debts due to him, and the liability incurred by him as aforesaid.

"13th. The Firm shall in addition to the said commission pay to the *Rajah* interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the Firm, and shall also pay to the banks all discount and interest now as hereafter payable on the said acceptances.

"Dated the 27th day of August, 1863.

"*W. A. Wilson.*
"*T. O. Watson.*"

Under the 10th clause of this Agreement the sum of Rs.27,458 14a. 4½p. was on the 30th of September, 1863, written over to the credit of the *Rajah* in the Books of the Firm in a separate account opened in his name, and called "Private Ledger for amount of his gain at 20 per cent. on net profit up to 30th April, 1863, as per Journal, Rs.27,458. 14a. 4½p."

After the date of this Agreement, the *Rajah* advanced further sums of money. He did not avail himself very largely of the powers conferred upon him by the Agreement, and he stated himself, that he did not understand much about commercial transactions; but there was evidence that he recommended Clerks for employment by the Firm; that he took part in dismissing a Clerk; that he came to the Office frequently, using the room set apart for the members of the Firm, and also the room used by the Partners to which persons dealing or having business with the Firm had access; that the accounts were offered for his inspection; that he inspected samples of Cotton; that the communications from *England* were read to him; that he consulted with the *Watsons* on the business; and that he was present when business was transacted, and took part in it.

It appeared that the *Watsons* held out the *Rajah* to be a Partner to the Plaintiffs and others. It also appeared that the *Rajah*, subsequently to the entry to his credit of the above sum of

Rs.27,458. 14a. 4½p., drew against the sum; but it appeared further, that afterwards, in March or April, 1864, this sum was written over to his debit in the Books of the Firm.

In the years 1864 and in 1865, the Firm of the *Watsons* fell into great difficulties, and were, in fact, insolvent. In March, 1865, the *Rajah* executed a Deed wherein, *inter alia*, the Agreement of the 27th of August, 1863, was recited, and whereby he released and relinquished all claim under the Agreement of the 27th of August, 1863, to "the said commission or profits," and all claims to any other moneys, except a sum which was stated in the Deed, and which was, by an Indenture of even date, secured by a mortgage of the Tea plantations at *Cachon*, under the Agreement of the 27th of August, 1863.

Shortly after this the *Watsons* became Bankrupts.

The Appellants appealed from the final judgment of the High Court, contending, on the facts and evidence, that the judgment of the Court of the 24 *Pergunnahs* was right, and that the judgment pronounced by the High Court of Judicature was wrong.

The *Solicitor-General* (Sir *G. Jessel*, Q.C.), Mr. *Lindley*, Q.C., and Mr. *F. M. White*, for the Appellant:—

This is a question of partnership, which must be decided by the true construction of the deed of Agreement between the late *Rajah Pertab Chunder Sing* and the Messrs. *Watson*, of the 27th of August, 1863. The relative position of the parties before that agreement might be, and probably was, only that of Debtor and Creditor. It appears from the evidence, that the *Rajah* had advanced, from time to time, very large sums to the *Watsons'* Firm to enable them to carry on their business, but there was no written agreement between the parties, and no partnership is alleged to have existed prior to the Agreement of the 27th of August, 1863. By that Agreement, in consideration of the sums already advanced, and to be advanced, by the *Rajah*, the Messrs. *Watson* bound themselves to make no shipments without the consent of the *Rajah*, to hold the shipping documents, and the proceeds of the shipments, at the disposal of the *Rajah*, not to obtain remittances from home in the shape of goods without his consent, or consignment of goods from home, and to make over to the *Rajah*, or hold

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under his control, all remittances received from home, whether in money or goods. Such remittances and their proceeds were to be held wholly at the disposal of the *Rajah* for the purpose of extinguishing the debt due by the *Watsons* to him; and even the proceeds of the sale of goods consigned free to the Firm were not to be remitted to the Consignees without the consent of the *Rajah*. The *Watsons*, moreover, bound themselves to consult the *Rajah* in all the details of the business, to regulate their establishment by his directions, to draw no money from the Firm for any purpose without his consent, and to allow him free access to all the Books and papers of the Firm. The Messrs. *Watson* further agreed, that the *Rajah* should, in consideration of the advances made, liability incurred, and future advances which might be made, receive a commission of 20 per cent. on all net profits made by the Firm, from time to time, commencing from the 1st of May, 1862, until such time as the whole of the debts due to him should be paid off, and the liability already incurred by him should be wholly extinguished; and the *Watsons* agreed not to alienate certain Plantations owned by them, the title deeds of which they made over to the *Rajah* as security, and gave him a lien on all their property, with a covenant to pay him 12 per cent. interest on all sums advanced. Now, it is in evidence, that the sum of Rs.27,458 was, under this Agreement, written over on the 30th of September, 1863, to the credit of the *Rajah* in the Books of the Firm, as his commission on the net profits up to the end of April in that year. After the date of this Agreement he advanced further sums of money to the Firm; and though it does not appear that he availed himself very largely of the powers conferred on him by the Agreement, yet he attended at the House of business from time to time, and interested himself generally in the concern, consulting with his Partners, the *Watsons*, and, if present, taking part in the business of the Firm. It is also in evidence that the *Watsons* considered and treated him as their Partner, and he is not proved to have done anything himself to disown or disprove that connection. Now, all these circumstances, coupled with the conditions and interests contained in the Agreement, constituted, as we maintain, and as was held by the Judge of the 24 *Pergunnahs*, a valid and subsisting partnership, and rendered the *Rajah* liable as a Partner from the date of the

Agreement, or, at least, as regards third parties to be treated as the *Watsons'* Partner. The Act to amend the Law of Partnership (28 & 29 Vict. c. 86) did, of course, not exist at the time of these transactions, nor if it had existed would it have applied to *India*, but it shews, when it declares by the 1st section, that a Lender is not to be considered a Partner, by advancing money for a share of profits, what the law was anterior to that enactment, and, we contend, it is now, as regards the circumstances of this case: Act, No. XV. of 1866. The case of *Cox* v. *Hickman* (1), which was relied on in the High Court, and will, no doubt, be relied on by the Respondent here, is distinguishable, and not in point. There some of the Creditors were to carry on the business as Trustees under the control and for the benefit of the others; and it was held that the Creditors were not partners under the Deed. So where there is no control or right to interfere, as in the case of the Executors of a deceased Partner, such Executors are no Partners: *Holme* v. *Hammond* (2); or of Inspectors carrying on the trade of the Firm under Deed without share of profits or control of the business: *Redpath* v. *Wigg* (3); *Easterbrook* v. *Barker* (4). In *Kilsham* v. *Jukes* (5), where the agreement was that a party was merely to be repaid a debt out of the profits, if any, of the business, the surplus to belong to other parties, there was considerable difference of opinion among the Judges as to the effect of the decision in *Cox* v. *Hickman*. An agreement for a man to have a share in the profits of the business till a debt is paid makes him a Partner: *Bond* v. *Pittard* (6); *Barry* v. *Nesham* (7); *Bloxam* v. *Pell* (8). Any specific participation in the profits creates a partnership: *Ex parte Hamper* (9); *The English and Irish Church Ins. Soc.* (10); *Shaw* v. *Galt* (11); *Bullen* v. *Sharp* (12); *Waters* v. *Taylor* (13); *Ex parte Langdale* (14). We maintain, therefore, that the *Rajah* was a Partner in the Firm of *Watson & Co.*, and was therefore bound by the acts of his

(1) 8 H. L. C. 268.
(2) Law Rep. 7 Ex. 218.
(3) Law Rep. 1 Ex. 335.
(4) Law Rep. 6 C. P. 1.
(5) 3 B. & S. 847; 22 L. J. (Q.B.) 217.
(6) 3 M. & W. 357.
(7) 3 C. B. 641.
(8) Cited in *Grace* v. *Smith*, 2 W. Bl. 999.
(9) 17 Ves. 403.
(10) 1 Hem. & Mil. 85.
(11) 16 Ir. C. L. Rep. 357.
(12) Law Rep. 1 C. P. 86.
(13) Tudor's L. C. on Mer. & Mar. Law [2nd Ed.], 347.
(14) 18 Ves. 300.

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co-partners in the usual course of business; and that, whether he was Partner or not, the *Watsons*, as his Agents, were authorized to pledge his credit; that he became jointly liable with them to the Appellants, and that the judgment of the Judge of the Court of the 24 *Pergunnahs* was right and ought to be sustained.

Sir *R. Palmer*, Q.C., Mr. *H. James*, Q.C., and Mr. *Doyne*, for the Respondent:—

There are no grounds for fixing the *Rajah* with liability as a Partner for the debts of the Firm of *Watson & Co.*, or any part of them. The Agreement of the 27th of August, 1863, was entered into by *Watson & Co.*, as Debtors, with the *Rajah*, as their Creditor, and in no other character; and its stipulations constitute only the terms of an arrangement between the *Rajah*, as such Creditor, and the Firm as his Debtors, as to the means by which payment of his debt should be provided for and secured. The provision for payment to the *Rajah* of a commission of 20 per cent., upon the net profits made or to be made by the Firm before the debt should be fully discharged, was not a contract for his participation in the profits of the business, nor a contract authorizing *Watson & Co.* to carry on the business for the joint benefit, or on the joint account, of the *Rajah* and themselves, but was, in effect, nothing more than a stipulation for an addition contingent upon, and proportionate to, any profits which might be realized by *Watson & Co.* to the ordinary rate of interest upon the *Rajah's* debt, such being a lawful stipulation as between Debtors and Creditor, and in no wise operating to make the Creditor a Partner in the Debtor's business. This is the true and legal effect of the Agreement between the parties, and it is preposterous to seek, as the Appellants have done, to make the *Rajah* liable under it for the entire claims of the Appellants upon *Watson & Co.* for private and partnership debts, from the commencement of their mutual dealings to the end of the year 1864. The law applicable to the case has been entirely misconceived by the Judge of the Court of the 24 *Pergunnahs*, but has been rightly applied by the High Court. The case must be governed by the decision of the House of Lords in *Cox* v. *Hickman* (1); there *Smith & Co.*, trading in that name, becoming embarrassed, executed a Deed, to which they were parties of the

(1) 8 H. L. C. 268.

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first part; certain of the Creditors, as Trustees, of the second part; and the general scheduled Creditors (among whom the Trustees were named), of the third part. The Deed assigned the property of *S. & S.* to the Trustees, and empowered them to carry on the business under the name of the "*Stanton Iron Company*," to execute all contracts and instruments necessary to carry it on, to divide the net income to be taken among the Creditors in rateable proportions (such income to be deemed the property of *S. & S.*), with power to the majority of the Creditors, assembled at a meeting, to make rules for conducting the business or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred by the Trustees to *S. & S.* Two of the Creditors, *C.* and *W.*, were named among the Trustees. *C.* never acted. *W.* acted for six weeks and then resigned. Some time afterwards the other Trustees, who continued to carry on the business, became indebted to *H.*, and gave him Bills of Exchange accepted by themselves "*Per proc.* the *Stanton Iron Company.*" It was held, that there was no partnership created by the Deed, and that consequently *C.* and *W.* could not be sued on the Bills as Partners in the Company. Now, the effect of this decision was to overrule the conclusion that had before prevailed, that because a man was interested in the profits of a partnership, therefore, he was a Partner, and to hold that participation in the profits did not of itself constitute a partnership; that it was indeed right, in deciding, whether or no a man was a Partner, to consider, whether or no he was interested in the profits; and their Lordships evidently attributed very great weight to that circumstance. But they emphatically put the question upon a wider ground; and the question now is, not did the person sought to be made liable participate in the profits, but has the Trade been carried on by persons acting on his behalf? The case of *Cox* v. *Hickman* has been followed and adopted in principle by the Exchequer Chamber in the case of *Bullen* v. *Sharp* (1), from the Common Pleas, where a memorandum of Agreement giving a contingent interest in the net average profits of the business of an Underwriter, was held not to constitute a partnership. That case overruled the *dictum* in *Grace* v. *Smith* (2), and the judgment in *Waugh* v. *Carver* (3), and upheld the decision

(1) Law Rep. 1 C. P. 109. (2) 2 W. Bl. 998. (3) 2 H. Bl. 235.

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of the House of Lords, in *Cox* v. *Hickman* (1) which must now be taken to be the only authority on the subject: *Stocker* v. *Brockelbank* (2), *Tudor's* L. C. on Mer. & Mar. Law, 343. *Story* on Partnership, ch. iv., sect. 49 [6th Ed.]; *Lindley* on Partnership [2nd Ed.], pp. 38–9.

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The consideration of their Lordships' judgment having been reserved was now delivered by

SIR MONTAGUE SMITH :—

The action which gives occasion to this appeal was brought by the Plaintiffs (the Appellants), Merchants of *London*, against the late *Rajah Pertab Chunder Sing*, to recover a balance of nearly three lacs of rupees claimed to be due to them from the firm of *W. N. Watson & Co.*, of *Calcutta*.

The *Rajah* having died during the pendency of the suit, the defence was continued by the Respondent, the Court of Wards, on behalf of his minor heir.

The plaint alleged that the Firm of *W. N. Watson & Co.* consisted of *William Noel Watson*, *Thomas Ogilvie Watson*, and the *Rajah*, and sought to make the *Rajah* liable as a Partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the Firm to the Plaintiffs during the time when it is contended that the *Rajah* was in partnership with the two *Watsons*.

The questions in the appeal depend, in the main, on the construction and effect of a written Agreement entered into between the *Watsons* and the *Rajah*; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two *Watsons* commenced business in partnership, as Merchants at *Calcutta*, in 1862, under the Firm of *W. N. Watson & Co.* Their transactions consisted principally in making consignments of goods to Merchants in *England*, and receiving consignments from them.

In January, 1863, they entered into an agreement with the Plaintiffs regulating the terms on which consignments were to be

(1) 8 H. L. Cases, 268. (2) 3 Mac. & G. 263.

made between them, and under which *W. N. Watson & Co.* were authorized, within certain limits, to draw on the Plaintiffs in *London* against consignments.

The *Watsons* had little or no capital. The *Rajah* supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting Bills, for which the *Watsons* obtained discount, and which the *Rajah* met at maturity. In the middle of 1863 the total amount of these advances was considerable, and the *Rajah* desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the *Watsons*.

Accordingly, an Agreement was entered into on the 27th of August, 1863, between the *Rajah* of the one part, and "Messrs. *W. N. Watson & Co.*" of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the *Rajah* to them, the *Watsons* agreed to carry on their business subject to the control of the *Rajah* in several important particulars, which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title deeds of certain tea plantations, and they also agreed, that "as further security" all their other property, landed or otherwise, including their stock in trade, should be answerable for the debt due to him.

The 10th and 13th clauses of the Agreement were as follows:—[His Lordship read these clauses, *ante*, p. 422.]

This Agreement is not signed by the *Rajah*, but he was undoubtedly an assenting party to it.

Subsequently to the Agreement, the *Rajah* made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865, the Firm of *W. N. Watson & Co.* fell into difficulties. An arrangement was then made, under which the *Rajah*, upon the *Watsons* executing to him a formal mortgage of the tea plantations, to secure the amount of his advances, released to them, by a Deed bearing date the 3rd of March, 1865, all right to commission and interest under the Agreement of August, 1863, and all other claims against them.

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In point of fact, the *Rajah* up to this time had never received possession of any of the property or moneys of the Firm, nor any of the proceeds of the business, and did not in fact receive any commission. A sum of Rs.27,000 on this account was, indeed, on the 30th of September, 1863, placed to his credit in the Books of the Firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the *Watsons*.

Some evidence was given as to the extent of the interference of the *Rajah* in the control of the business. It seems the *Rajah* knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the *Rajah* availed himself only in a slight degree of the powers of control conferred upon him by the agreement: in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the *Rajah* do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the *Rajah* on the ground that he was an ostensible partner, and, therefore, liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the *Watsons* to the Plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the *Rajah*.

The liability, therefore, of the *Rajah* for the debts contracted by *W. N. Watson & Co.* must depend on his real relation to that Firm under the agreement.

It was contended, for the Appellants, that he was so liable:

First, because he became by the Agreement, at least as regards third persons, a Partner with the *Watsons;* and

Secondly, because, if not "a true partner" (the phrase used by Mr. *Lindley* in his argument), the *Watsons* were the Agents of the *Rajah* in carrying on the business; and the debt to the Plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of *India* and at their

Lordships' Bar, on the basis that the law of *England* relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in *India* on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that Country to a right decision. But whilst this is so, it should be observed that in applying them, the usages of trade and habits of business of the people of *India*, so far as they may be peculiar, and differ from those in *England*, ought to be borne in mind.

The Agreement, on the face of it, is an arrangement between the *Rajah*, as Creditor, and the Firm consisting of the two *Watsons*, as Debtors, by which the *Rajah* obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the *Watsons* by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the *Rajah* as a Creditor of the firm.

It was contended at the Bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (See this pointedly stated by Mr. Justice *Blackburn*, in *Bullen* v. *Sharp* (1).) The rule had been laid down with distinctness by *Eyre*, C.J., in *Waugh* v. *Carver* (2), and the reason of the rule the Chief Justice

(1) Law Rep. 1 C. P. 109. (2) 2 H. Bl. 235.

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thus states: "Upon the principle that, by taking a part of the profits, he takes from the Creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace* v. *Smith* (1), and we think it stands upon fair grounds of reason."

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord *Eldon*) "to a given quantum of the profits."

The distinction was stated to be "clearly settled" and was acted upon by Lord *Eldon* in *Ex parte Hamper* (2), and in other cases. It was also affirmed and acted on in *Pott* v. *Eyton* (3), where *Tindal*, C.J., in giving the judgment of the Court, adopts the rule as laid down by Lord *Eldon*, and says, "Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as Agent, or commission on sales (4)."

The present case appears to fall within this distinction. The *Rajah* was not entitled to a share of the profits "as such;" he had no specific property or interest in them *quâ* profits, for, subject to the powers given to the *Rajah* by way of security, the *Watsons* might have appropriated or assigned the whole profits without any breach of the agreement. The *Rajah* was entitled only to commission, or a payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character

(1) 2 W. Bl. 998. (2) 17 Ves. 412. (3) 3 C. B. 32. (4) Ibid. 40.

it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox* v. *Hickman* (1) and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh* v. *Carver* (2), and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox* v. *Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible Partner can be held liable to a Creditor of the Firm. The reason given in *Grace* v. *Smith*, that by taking part of the profits he takes part of the fund which is the proper security of the Creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the Mortgagee a Partner.

Where a man holds himself out as a Partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which Creditors may be presumed to have acted. A man so acting may be rightly held liable as a Partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the introduction to Mr. *Lindley's*

(1) 8 H. L. C. 268. (2) 2 H. Bl. 235.

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excellent Treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the *Rajah* to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the *Rajah* was constituted, in fact, the managing Partner.

The contract undoubtedly confers on the *Rajah* large powers of control. Whilst his advances remained unpaid, the *Watsons* bound themselves not to make shipments, or order consignments, or sell goods, without his consent. No money was to be drawn from the Firm without his sanction, and he was to be consulted with regard to the office business of the Firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied, without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt.

On the other hand, the *Rajah* had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the *Watsons* to continue to trade, or even to remain in partnership; his powers, however large, were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt.

Their Lordships are of opinion, that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the Agreement was that of Creditor and Debtors. The *Watsons* evidently wished to induce the *Rajah* to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the Agreement is really found[illegible] on the

assumption, not of community of benefit, but of opposition of interests.

It may well be, that where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to shew that any other was contemplated; but that is not the present case, where another and different contract is shewn to have been intended, viz., one of loan and security.

Some reliance was placed on the Statute, 28 & 29 Vict. c. 86, sect. 1, which enacts, that the advance of money to a firm upon a contract that the Lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a Partner, or render him responsible as such. It was argued, that this raised an implication that the Lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the Legislature supposed it to be, the implication arising from the Statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the 5th clause of the Act, so far as regards *England*, it is not necessary for their Lordships to consider. The Indian Act, No. XV. of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the Appellants that if "a true partnership" had not been created under the Agreement, the *Watsons* were constituted by it the Agents of the *Rajah* to carry on the business, and that the debt of the Plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of Principal and Agents must on some other ground be shewn to exist. It is clear that this relation was not expressly created, and was not intended to be created by the Agreement, and that if it exists it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the *Rajah*. But this is again an attempt to create, by operation of law, a relation opposed to the real agree-

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ment and intention of the parties, exactly in the same manner as that of Partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the *Watsons* and the *Rajah* so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the *Rajah*, as principal, in any other character. He was not, in any sense, the Owner of the business, and had no power to deal with it as Owner. None of the ordinary attributes of Principal belonged to him. The *Watsons* were to carry on the business; he could neither direct them to make contracts, nor to deal with particular Customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and subject to those powers, the *Watsons* remained Owners of the business and of the common property of the firm. The Agreement in terms, and, as their Lordships think, in substance, is founded on the relation of Creditor and Debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, viz., one of loan and security between Debtors and their Creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as Principals, and putting forward, as ostensible Traders, others who are really their Agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the *Rajah* was not liable for the debts of the Firm of *W. N. Watson & Co.*, took a correct view of the case; and they will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Hillyer, Fenwick, & Stibbard.*
Solicitor for the Respondent: *J. H. Wrentmore.*

ROBERT HART . . . . . APPELLANT; J. C.* 1872 Nov. 12, 14.

AND

JOHANNES VON GUMPACH . . . . . RESPONDENT.

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AND JAPAN.

Jurisdiction of British Court in China and Japan—Treaty of Tientsin—Action for libel—Privileged communication—Misdirection—Pleading.

In an action brought in Her Majesty's Supreme Court for *China* and *Japan*, for false representations made by the Defendant, occupying an official post in the service of the Emperor of *China*, to the *Tsung-li-Yamên*, the head of the Foreign Board at *Peking*, respecting the conduct of the Plaintiff as a Professor in the College established there, which led to his dismissal by that Board, the alleged misrepresentations being, that the Plaintiff had asked to be relieved from his duties, and declined to perform them, and that he had absented himself from *Peking* at a time when his active services might be required at the College. The Defendant, in reply, denied that he had made any false representations, and asserted that such representations as he had made were contained in a report made by him in the course of his duty as an Officer of the Chinese Government. The Judge in his summing-up directed the jury that, whether the Defendant had made false representations, and the Chinese Government had dismissed the Plaintiff in consequence, was a thing specially for the jury to consider, and whether the representations were warranted by facts. The jury found for the Plaintiff, and gave large damages. A rule nisi was afterwards obtained for a nonsuit, or new Trial, on the ground of misdirection, and that the verdict was against evidence. The misdirections complained of were (1) that the Judge did not direct the jury that the representations were privileged; (2) not leaving to the jury the question, whether the representations were wilfully false; and (3) that there was no evidence to go to the jury that the representations were wilfully false. The Supreme Court discharged the rule. On appeal:—

Held, by the Judicial Committee, that the Judge's summing-up was erroneous, that the representations complained of were privileged communications, that the Judge ought to have explained to the jury the relation and position of the parties, and have told them that the action would not lie, if the statements were made honestly and in a belief of their truth, without proof of express malice, and not whether they were warranted in fact, and that the burden was on the Plaintiff to prove that they were not so made.

Semble: Where the rules of pleading in a Court in a Foreign Country having jurisdiction over British subjects, are by petition and answer, the

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* *Present:*—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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several paragraphs of the answer can be read together, and not as in English pleadings treated as separate pleas.

Her Majesty's Supreme Court for *China* and *Japan*, established by Order in Council of the 9th of March, 1865, under the Treaty of *Tientsin*, having cognizance of all questions in regard to rights, whether of property or persons, arising between British subjects, "resident in or resorting to the dominions of the Emperor of *China*," has jurisdiction to try such action for alleged false representations.

THIS case was brought by appeal from two several judgments and orders of Her Majesty's Supreme Court for *China* and *Japan*, at *Shanghai*, made respectively on the 29th of March, 1870, and on the 3rd of May, 1870, in an action wherein the Respondent was the Plaintiff, and Appellant the Defendant.

The Appellant occupied an official position in the service of the Emperor of *China* as Inspector-General of Customs.

The Respondent, for some time prior to the commencement of the action, was also in the service of the Emperor of *China*, as one of the Professors of the *Tung-Wên-Kwan*, a College of the western sciences at *Peking*, having been so appointed by the Appellant, under the authority given him by the *Tsung-li-Yamên*, or Foreign Board, at *Peking*.

In February, 1870, the Respondent filed a petition against the Appellant before the Chief Judge of the Supreme Court for *China* and *Japan*, whereby he alleged, that the Appellant had induced him, by false and fraudulent representations, to leave *England* and accept the appointment of Professor in the *Tung-Wên-Kwan*. The petition further alleged, that the Appellant had wilfully and falsely represented to the *Tsung-li-Yamên* at *Peking*; that the Respondent had asked to be relieved from his duties as Professor, and declined to perform them; that he had absented himself from *Peking* at a time when his active services might be required in the College, and that the Appellant had thereby obtained an intimation from the *Tsung-li-Yamên* that the services of the Respondent were not required. The petition further alleged, that the sum of £700 was due from the Appellant to the Respondent for money had and received and on account stated between them.

The Appellant, by his answer, denied that he made the false and fraudulent representations alleged to have been made by him to the Respondent. He further denied, that he made to the *Tsung-*

li-Yamên the wilful and false representations alleged. As regarded the money claim, the answer stated, that the Respondent had received salary or compensation up to the 30th of September, 1869; that *taels* 158 had been paid to the order, or by the direction, of the Respondent to certain persons at *Peking;* and that *taels* 176.20, being the balance of a sum which the Chinese Government were willing to pay to the Respondent, for certain considerations known to the Government, were tendered to the Respondent, but he refused to sign the receipt which, by the authority of the Government, was required of him, and that the Appellant never was indebted to the Respondent. The answer, in addition, contained the following paragraphs, referring especially to the alleged false representations to the *Tsung-li-Yamên.*

"And for an answer to so much of the petition as is contained in the 7th, 8th, and 9th paragraphs of the said petition, the Defendant says, that previous to and at the time of the said representations complained of, the Plaintiff and the Defendant were both in the employ of the Chinese Government, and it was the Defendant's duty, in pursuance of such employment, at various times, and from time to time, to report to the *Tsung-li-Yamên,* or Foreign Board, at *Peking,* upon the conduct of, and representations and movements of, the Professors attached to the *Tung-Wên-Kwan,* and upon those of the Plaintiff amongst others; and the Defendant, in the ordinary course, and in the lawful exercise of his duty, and because it became necessary and incumbent upon him by his duty to the said Chinese Government, in pursuance of such employment as aforesaid, to do so, and as an act of duty and not otherwise, made certain reports of and concerning the conduct, movements, and representations of the Plaintiff, which are the wilful and false representations complained of in the said petition."

"And for a further answer to the whole of the said petition, the Defendant says—That in so far as it relates to any representations made and acts done, having reference to the said *Tung-Wên-Kwan,* he was previous to, and both he and the Plaintiff were during the whole of the time in the said petition referred to, in the employ of the Chinese Government, and in such employment it became and was his, the Defendant's, duty to superintend all the affairs connected with the *Tung-Wên-Kwan,* and the Foreigners connected

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therewith, and to make such representations, write such Letters, do such acts, and pay such sums of money, as to the said Defendant in his discretion should seem fit in the premises, and that any and every of the representations made, Letters written, acts done, or sums of money held by the Defendant, or withheld from the Plaintiff by the Defendant, or by the Defendant's order, as alleged in the said petition, were so made, written, done, held, or withheld respectively by the Defendant in the exercise of his lawful authority, in pursuance of such employment, and in the exercise of his said duty as a servant to the said Imperial Chinese Government, and in pursuance of no other object, and in virtue of his said position, and in virtue of no other."

The Respondent moved for, and obtained leave to demur to the paragraphs above set forth.

The demurrer came on to be argued on the 29th of March, 1870, when judgment was given for the Respondent, and it was ordered that those paragraphs (amongst others) should be struck out as furnishing no answer in law.

The answer of the Appellant was accordingly amended pursuant to this Order.

The action came on for trial on the 13th of April, 1870, before *C. W. Goodwin*, Esq., Assistant Judge of the Supreme Court for *China* and *Japan*, and a jury.

The facts of the case were, in substance, as follows :—

The Appellant, who was formerly in the employ of the British Consular Service in *China*, had accepted, some years ago, from the Chinese Government, the appointment of Inspector-General of Customs. Amongst other duties he had to look after the Foreign Department of the *Tung-Wên-Kwan*, an institution established at *Peking* for the purpose of teaching the Chinese Western languages and sciences. The Appellant left *China* for Europe in 1866, and before leaving had a conversation with the Ministers of the *Tsung-li-Yamên*, or Foreign Board, about extending the *Tung-Wên-Kwan*, and received instructions to find Professors, and appoint their salaries and duties. The Appellant, whilst in *England*, and in the summer of 1866, appointed Mr. *J. D. Campbell* to be Chief Secretary to the Inspector-General of Customs, and about the same time was introduced by Mr. *Campbell* to the Respondent,

who had written certain works on subjects connected with mathematics and astronomy. The Appellant subsequently appointed the Respondent to the Chair of Mathematics and Astronomy in the *Tung-Wên-Kwan*, at a salary of £600 per annum. The Appellant stated, that at an interview with the Respondent, prior to thus appointing him, he told him what the character of the College was, and what the Professors would have to do, adding that it was now in its infancy, but that in the course of time, after years, it would grow to the equivalent of the Universities in Europe. According to the statement of the Respondent, the Appellant and Mr. *Campbell*, on his behalf, made certain other representations to him, which induced him to accept the appointment and to go out to *China*, and which were the fraudulent representations complained of in the petition. The Appellant and Mr. *Campbell*, however, both denied that any such representations were made. The Respondent left *England* in pursuance of his appointment, and arrived at *Peking* in November, 1866. At the time of his arrival none of the Students were prepared to receive mathematical instruction in the English language, but the Respondent was in the meantime to occupy himself in the study of Chinese. In the year 1867, the Respondent became discontented with his position, and anxious to be relieved altogether of the duty of teaching mathematics, and to be Director of the Observatory only. He, as he alleged, was informed by the Appellant, in February of that year, that he was made Director of the Observatory; and was relieved of the Chair of Mathematics, to which another person was appointed. No other person was, however, appointed Professor of Mathematics during the whole time that the Respondent continued to be a Professor of the College.

It appeared that in May, 1868, the Appellant informed the Respondent that he could not relieve him from his mathematical duties, and that he ought to study Chinese to fit himself to perform them. The Respondent, however, protested against being called on to teach mathematics, saying it was an indignity to a man of his position, and that he positively refused to do so. The Appellant thereupon told him that it was necessary to come to an understanding, and that if he would not remain and teach mathematics the utmost he could do for him was to give him a year's pay and his passage home.

In the following June the Respondent informed the Appellant

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that he had made up his mind to go away, but asked to be allowed to remain till the end of the summer. To this the Appellant did not object; and when the Respondent left at the end of the interview, it was on the understanding that he was giving up his position, that he was to receive his allowance to the end of the quarter, and that he was then to have a year's pay and his passage home.

The Respondent, by his evidence, denied that any such understanding was come to, but about the time that it, according to the Appellant's evidence, took place, the Respondent made preparations for leaving, selling his furniture, and a number of his Books.

It appeared, however, that in October, 1868, the Appellant instructed his Secretary, Mr. *Wieters*, to write and inquire in what way the Respondent wished his money to be paid; that Mr. *Wieters* accordingly, on the 6th of October, 1868, wrote in German to make this inquiry. On receipt of an answer from the Respondent, pay to the end of the September quarter, and the one year's pay promised on his retirement, was sent to the Respondent, and its receipt acknowledged by him on the 8th of October, 1868. After receiving this money, the Respondent wrote to the Appellant a Letter, dated the 11th of October, to inquire if the year's pay was an annual addition to his salary.

The Appellant, in answer, wrote a Letter, wherein, after recapitulating the terms of the arrangement made, he stated that the year's pay was the allowance promised on the termination of the Respondent's connection with the College, and that the Commissioners of Customs would provide him a passage home.

The Respondent, in reply notified that he could not accept the propositions and statements in the Letter, as they were unwarranted and at variance with the facts; but he did not return the sum sent to him, as explained by the above Letter of the Appellant, as the year's pay allowed on his retirement.

No further communication was received from the Respondent until about a year afterwards, namely, on the 11th of October, 1869, when he wrote to the Appellant, asking for from 1,200 to 1,500 *taels* on account of salary due, and suggesting that the differences pending as to salary and other matters should be referred to arbitration. The Appellant, in reply, inquired what the questions were which the Respondent desired to be submitted to arbitration, and

having received the Respondent's answer, the Appellant explained at length his reasons for declining to agree to an arbitration.

In September, 1869, the Appellant wrote to the *Tsung-li-Yamên*, reporting the Respondent's resignation of his post as Professor of the *Tung-Wén-Kwan*, having previously mentioned it to members of the Board by word of mouth.

The Appellant having, however, learned from Dr. *Martin*, who was at that time President of the *Tung-Wén-Kwan*, that the Respondent did not desire to be regarded as having resigned, and considered that he had not done so, wrote a despatch to the *Tsung-li-Yamên* on the 22nd of November, 1869, withdrawing his despatch about the Respondent's resignation.

On the 27th of November, 1869, the Respondent wrote to the Appellant, stating that the Appellant's refusal to settle the differences pending by arbitration or amicable arrangement, imposed on him the necessity of submitting them to a legal decision. He stated further that he intended, with that view, proceeding to *Shanghai* on the next day, and requested the Appellant to acquaint the Imperial Government with the occasion for and object of his temporary absence from the capital.

The Appellant reported to the *Tsung-li-Yamên* accordingly, and received from the *Tsung-li-Yamên* a despatch stating that in view of the action taken by the Respondent it was not fitting that he should be any longer retained as a Professor in the College, and desiring the Appellant to intimate the same to the Respondent, which the Appellant did, by a Letter, dated the 30th of November, 1869.

It was determined on behalf of the Government to pay the Respondent his salary down to the 30th of November, 1869, the date of the above Letter, and a cheque for 176 *taels*, the balance of such salary, was tendered to the Respondent, but he refused to sign the receipt required of him in exchange on behalf of the Chinese Government, and the cheque was, therefore, not handed to him. The Appellant never received this sum; it remained in the Chinese Government Funds, payable to the Respondent's order (1).

(1) The Letters forming the correspondence between the Appellant and Respondent, and those sent by the Appellant to the *Tsung-li-Yamên* regarding the Respondent's resignation of office, are fully stated and set out in their Lordships' judgment, *post*, p. 453 to 457.

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The action was tried on the 13th of April, 1870, and two following days before Mr. *Charles Goodwin*, Assistant Judge of the Supreme Court, and a jury.

The Appellant's Counsel contended at the trial that the reports made by the Appellant to the *Tsung-li-Yamên* were privileged, and that there was no evidence to go to the jury in support of the Respondent's case. The learned Judge ruled that there was evidence to go to the jury on all the claims of the Respondent, except that on the money counts there was evidence only as to 176 *taels*. The summing-up of the learned Judge, with reference to the questions upon which the verdict was found for the Respondent, was as follows:—"The second issue was—whether Mr. *Hart*, by misrepresenting that the Baron (the Plaintiff) was absent from *Peking* when he was wanted, made a false statement?—and did the Chinese Government dismiss him in consequence? It was a thing specially for the jury to consider, whether the representations were warranted by facts. Then supposing they found that injury had been done Plaintiff, the question again arose—What was the amount of damage? The Plaintiff was in receipt of a present income, to which there appeared a possibility of increase at the end of five years, so that there was a possible loss if they found that he had been unjustly deprived of his post. He did not for a moment mean to say, that this salary must be taken as an absolute measure of damages. This was not a case of contract. It was that of a man who was alleged to have been put out of something which he had, in consequence of a false representation. He might get his living elsewhere. He might get out of *China*, and get rid of the risk to life there. They must take all this into consideration if they thought he had been unjustly deprived of his appointment. In regard to the 176 *taels*, he believed he must tell them that they would have to return a verdict for that sum."

The jury returned a verdict for the Appellant upon that part of the petition relating to the alleged fraudulent representations of of the Respondent. On the second part, relating to the alleged wilful and false representations to the *Tsung-li-Yamên*, they found for the Respondent (the then Plaintiff), and assessed the damages at £1,800 on the account stated; they also found for the Respondent for the 176 *taels*.

On the 20th of April, 1870, a rule *nisi* on the ground of misdirection—the Judge not having left to the jury, first, whether the representations were privileged, and secondly, whether they were wilfully false, and thirdly, that there was no evidence to be left to the jury—was granted by the Supreme Court to set aside the verdict so found for the Respondent.

The rule came on for argument on the 3rd of May, 1870, before Sir *Edmund Hornby*, Chief Judge of the Court, and *C. W. Goodwin*, Esq., Assistant Judge, when judgment was pronounced for the Respondent, and it was ordered that the rule be discharged.

Against this judgment and Order the Appellant obtained leave to appeal, and also special leave to appeal from the prior Order of the 29th of March, 1870.

Sir *John Karslake*, Q.C., and Mr. *Herschell*, Q.C., for the Appellant:—

The first question is as to the jurisdiction of the Supreme Court in *China*. The complaint of the Respondent against the Appellant was in respect of acts done in *China* by the Appellant, in his official character as functionary of the Chinese Empire. Such acts were not within the cognizance of, and ought not to have been inquired into or adjudicated upon, by Her Majesty's Supreme Court for *China* and *Japan*. The Supreme Court for *China* and *Japan* was established by the Orders in Council of the 9th of March, 1865, issued pursuant to the provisions and powers contained in the 6 & 7 Vict. c. 80, and the 6 & 7 Vict. c. 94; and we admit has jurisdiction over all British subjects resident in *China;* but the question which arises here is, whether the Queen had, under these Acts, or in any other form, authority to constitute a Court, with power to adjudicate as between British subjects for acts done by them in the service of and under the authority of the Emperor of *China*. That is a far wider question, and must depend on the Law of Nations. The Treaty of *Tientsin* of the 24th of October, 1860, which is the foundation of Her Majesty's jurisdiction in *China*, by Art. 15 provides that all questions arising between British subjects are to be subject to the jurisdiction of the Court to be thereafter established, that was the Supreme Court; but no jurisdiction was given over such British subjects as the Municipal Courts in *China* would

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have jurisdiction over. The cases of *The Duke of Brunswick* v. *The King of Hanover* (1); and *Munden* v. *The Duke of Brunswick* (2); illustrate the doctrine we contend for. *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (3); *The East India Company* v. *Syed Ally* (4): *Duke of Brunswick* v. *Harmer* (5); *Wadsworth* v. *Queen of Spain* (6); *De Haber* v. *Queen of Portugal* (7); are all cases shewing that where the Municipal Courts of a Country have jurisdiction over the subjects resident in a foreign Country, those Courts are the proper Tribunals to take cognizance of causes where one of the litigants is in the service of the Foreign Sovereign: *Wheaton* on International Law, Part II., ch. II., p. 285 [Ed. 1863]. That is our first objection, but assuming that the Supreme Court had jurisdiction to try a case such as this, where one of the parties was, though a British subject, in the service of a Foreign Sovereign; the question really is, whether there was any ground of action, whether the reports made by the Appellant to the Chinese Government, in his official capacity, with respect to the conduct of the Respondent as a subordinate official of the same Government, were not privileged communications, and whether such privilege ought not to have been held a good defence to the action brought in Her Majesty's Supreme Court in *China*. We maintain that these were privileged communications: *Dawkins* v. *Lord Paulet* (8); *Dawkins* v. *Lord Rokeby* (9). Then there was no evidence of express malice, and the Judge, in his charge to the jury, ought to have told them so.

Moreover, the learned Judge misdirected the jury in telling them that they would have to find for the Respondent on the money claims for 176 *taels*, for there was no evidence to go to the jury in support of such a claim, and the verdict, so far as it found for the Respondent, was against the weight of evidence, and the damages were excessive; we submit, therefore, that the Appellant is entitled to have the Judgments and Orders of the 29th of March and the 3rd of May, 1870, reversed.

(1) 6 Beav. 1.
(2) 10 Q. B. 656.
(3) 13 Moore P. C. Cases, 22.
(4) 7 Moore's Ind. App. Cases, 555.
(5) 19 L. J. (Q.B.) 20.
(6) 17 Q. B. 171.
(7) Ibid. 196.
(8) Law Rep. 5 Q. B. 94.
(9) 4 F. & F. 806.

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Mr. *Benjamin*, Q.C., and Mr. *P. Myburgh*, for the Respondent:—

The Respondent was entitled to the Judgment and Orders complained of. The Supreme Court had alone jurisdiction to try the case, for it was in that Court only that the Appellant was liable to the Respondent for the wrongs he had committed against him. The Chinese Government had not adopted the acts of the Appellant as their servant, and, therefore, his correspondence with their Officer was not an act of State, and was not privileged. It was idle for the Appellant to say, that what he did was by order of the Chinese Government, and that, therefore, he was not amenable to the laws in Her Majesty's Supreme Court for *China* and *Japan*. The Order in Council of the 9th of March, 1865, Arts. 4 and 5, confers ample jurisdiction on the Supreme Court, and declares, that the law of *England* is the law to be administered. There was no necessity for the jury to find malice. In the case of damage occasioned by a wrongful act, though such as the law deems an injury, malice is not a necessary ingredient to the maintenance of an action: *Rogers* v. *Rajendro Dutt and others* (1); *Ferguson* v. *The Earl of Kinnoull* (2). But, if necessary to enlarge on this point, it was sufficiently averred in the petition and proved: *Buron* v. *Denman* (3); *Dobree* v. *Napier* (4). It was no such privileged communication as protected the Defendant in *Dawkins* v. *Lord Paulet* (5). There was no misdirection to the jury: *Greene* v. *Bateman* (6); *Fray* v. *Blackburn* (7); *Taylor* v. *Hawkins* (8). The question of privilege cannot be carried to such an extent as is argued for here, to shield a man from the consequences arising from false representations. None of the cases cited support the Appellant's contention.

The case stood over for consideration.

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Jan. 28.

Their Lordships now delivered judgment by

SIR MONTAGUE SMITH:—

This is an appeal from judgments of Her Majesty's Supreme Court

(1) 13 Moore's P. C. Cases, 209.
(2) 9 C. & F. 321.
(3) 2 Ex. 167.
(4) 2 Bing. N. C. 781.
(5) Law Rep. 5 Q. B. 94.
(6) Law Rep. 5 H. L. 591.
(7) 3 B. & S. 576.
(8) 16 Q. B. 308.

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for *China* and *Japan*, at *Shanghai*, established in the dominions of the Emperor of *China* by virtue of the Treaty of *Tientsin*.

The Appellant and Respondent are English subjects in the service of the Chinese Government. The former holds the office of Inspector-General of Customs, one of his duties being to treat with Foreigners on matters in which the Imperial Government is concerned, under the general direction of the *Tsung-li Yamên*, a Board of Ministers for Foreign Affairs.

The Chinese Government having determined to establish a College at *Peking*, for the purpose of teaching "Western languages and Sciences," the Appellant was authorized by the *Tsung-li-Yamên* to engage Professors, and was invested with the general superintendence of the College. Acting on this authority he came to *England*, and the Respondent on his appointment accepted the office of Professor of Mathematics and Astronomy in the College, at a salary of £600 a year.

The action which gives occasion to this appeal was brought by the Respondent for alleged false representations made by the Appellant to the *Tsung-li-Yamên*, respecting his conduct as Professor, which led to his dismissal by that Board.

The petition included a charge of alleged misrepresentation, made to induce the Respondent to accept the professorship, which the jury disposed of in favour of the Appellant. It also contained a money claim, which will be separately considered hereafter.

In the answer of the Appellant to the charge of false representation, he denied that he had wilfully and falsely made the alleged representations, and he asserted that the representations respecting the Respondent were contained in a report made by him to the *Tsung-li-Yamên*, in the course of his duty as a servant to the Imperial Chinese Government.

The Respondent demurred to the paragraphs of the answer which raised the defence of official privilege, and the Court ordered the paragraphs to be struck out. This is one of the orders appealed from.

The other issues were tried before the Assistant Judge and a jury, and a verdict found for the Plaintiff (the Respondent) with large damages.

A rule *nisi* was afterwards obtained for a nonsuit or a new trial

on the ground of misdirection, and that the verdict was against the evidence.

The misdirections complained of were: first, the Judge not having directed the jury that the representations were privileged; second, not having left to the jury whether the representations were wilfully false; third, that there was no evidence to go to the jury that the representations were wilfully false. The last point appears in the rule as a ground of nonsuit; but it may be taken as an objection to the direction of the Judge, because, if there was no evidence that the statements were wilfully false, the Judge ought to have directed a verdict for the Defendant.

After argument the Court discharged the rule, which is the second Order appealed from.

It will be convenient first to advert to the facts, and the trial and the rule for a new trial, before considering the judgment on the demurrer.

The Respondent, and the Appellant, and Mr. *Campbell*, his Secretary, were examined, and a long correspondence read upon the trial. It appeared that on the 15th of August, 1866, the Respondent, who was then in *England*, received an official Letter from the Appellant to say, that he had been selected for appointment "to the Chair of Mathematics and Astronomy at the *Tsung-wén-Kwan* (College) at *Peking*." After his arrival at *Peking*, obstacles arose to the establishment of a class in astronomy, and to the erection of an Observatory. The Respondent was disappointed, and complained of the delay, and especially of the loss of the opportunities he expected for scientific observations. He evinced at the same time great disinclination to become a Teacher of a class in mathematics. He continued to receive his salary, but no classes in mathematics or astronomy were formed. Various suggestions were made to expedite the formation of these classes, and to employ the time of the Respondent meanwhile, but they led to no result. In 1868 he went to the Hills, and was absent from *Peking* for some time. About June in that year he had interviews with the Appellant and Mr. *Campbell*, in which he expressed his determination to return to *England*. This fact is beyond dispute, for it is admitted in the Respondent's own evidence.

The Appellant and Mr. *Campbell* state, that at these interviews

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the Respondent also declared that he would not teach mathematics. The Appellant says:—"He protested against being called on to teach mathematics—it was an indignity to a man in his position to teach mathematics. He positively refused to do so." Mr. *Campbell* says:—"In June, 1868, he was constantly complaining. He told me he was required to teach mathematics, and he could not, and would not." The Respondent was not recalled to contradict these explicit statements. He no doubt said in his evidence in chief, "During the whole of the time I was not called upon to perform any duties, nor did I refuse to do any." This may be literally true, as classes were not actually formed. He adds:—Mr. *Hart* came to me and asked me whether I would take again the Chair of Mathematics. I expressed my astonishment, as I understood Mr. *Jamieson* was appointed. I said I preferred to keep to our agreement. *Hart* appeared satisfied." This evidence cannot be regarded as a satisfactory denial of the explicit statements that he had declared that he would not teach mathematics. It is to be observed that there is no proof of the appointment of Mr. *Jamieson*.

At one of these interviews discussions took place with reference to putting an end to the Respondent's engagement, and the terms on which it should be done. According to the Appellant's evidence it was arranged, that the Respondent should give up his appointment at the end of the coming September quarter on receiving his salary for that quarter, and in addition an allowance of one year's salary and a free passage home. The Respondent denies that such an arrangement was made, but the fact is beyond dispute that, early in the following month of October, the quarter's salary and a year's additional salary were received by him. Soon after this payment, he wrote to inquire whether the year's pay was "an annual addition" to his salary. Now, whatever misunderstanding may have existed upon the question of a final agreement to terminate his engagement having been come to, there could be none as to the grounds upon which the allowance of a year's pay had been made by the Appellant, who at once replied to this inquiry by a Letter of the 15th of October, 1868:—"You now inquire if the year's pay is 'an annual addition' to your salary—it is not; it is simply the allowance I promised should be issued to you at the end of the September quarter, on the termi-

nation of your connection with the College." In the same Letter he was told that the Commissioner of Customs had instructions to provide for him a free passage home. The Respondent, in reply to this Letter, protested against the propositions, and the truth of the statements contained in it; but he kept the money.

The Respondent remained in *China*, but for a year there seems to have been no communication between the parties. On the 11th of October, 1869, however, he wrote to the Appellant asking for 1,200 or 1,500 *taels* on account of his salary, and suggesting whether it would not be expedient "in the common interest, and more especially in that of the Imperial Government," to settle all differences by arbitration or otherwise. He was asked to state what the differences were, and he answered by giving a series of questions, so framed as to open his original engagement and all subsequent agreements, and to leave generally to an Arbitrator what he was in justice and equity entitled to receive as compensation from the Chinese Government. The Appellant, in a long Letter in reply, recapitulated the history of the Respondent's relations with the Imperial Government, and in the end stated that the questions were not of a nature which, as the Agent of the Government, he would be justified in submitting to arbitration.

In the course of this renewed correspondence, the Respondent expressed a strong desire to stay in *China*, and urged his claim "in the common interest of science at large, and of Chinese science in particular," and expressed a desire "to write the history of Chinese astronomy and mathematics." It appears also that about this time Mr. *Martin*, the Head of the Professors, made a communication to the Appellant in his favour, which induced the Appellant to recall the despatch he had sent to the *Tsung-li-Yamên* reporting the Respondent's resignation; and on the 22nd of November, 1869, he thus writes to Mr. *Martin*:—

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"*Inspectorate-General of Customs,*
Peking, 22nd November, 1869.

"Sir,

"Having reference to Mr. *Von Gumpach*, who claims to still hold an appointment in the *Tung-wên-Kwan*, I beg to inform you that I never had any desire to displace him, and as he himself does not desire to be regarded as having resigned, I have written officially to the *Yamên* to withdraw my former despatch, and to

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state that Mr. *Von Gumpach*, with your approbation, continues to retain his position,

"I am,
"Sir,
"Your obedient Servant,
"ROBERT HART,
"*Inspector-General.*

"Revd. *W. A. P. Martin*, D.D.,
"President of the *Tung-wên-Kwan, Peking.*"

On the same day the Appellant sent the following despatch to the *Tsung-li-Yamên*:—

"*Peking, 22nd November*, 1869.

"It will be remembered that I addressed the *Yamên* in my despatch of 22nd September, 1869, with reference to *Fang-Ken-pa* (*Von Gumpach*) who was long since engaged by me in behalf of the *Yamên* as a Professor in the *Tung-wên-Kwan* (*lit.*, Government School of Languages) explaining that, in consequence of my having refused his request to raise a raised terrace (Observatory?) and to purchase books, *Fang-Ken-pa* had afterwards steadily declined to do any of the work that was allotted to him. And I (therein) reported that he had said to me in June, 1868, that 'as there had been words to the effect that he might return to his Country, why perhaps he had better resign and do so.' I now have to state that I am told by *Tng-wei-liang* (Mr. *W. Martin*), the Head of the Professors, that *Fang-Ken-pa* has not yet returned home, and further that he holds that my action above, in requesting of the *Yamên* that his functions might cease (*i.e.*, to accept his resignation), was without any agreement or consent on his part.

"Since, therefore, the Professor in question declares that he has not resigned, I have to request that the *Yamên* will lay aside my despatch about his functions ceasing.

"I must consult with the newly-made Head of the College as to the way in which this matter is to be settled.

"As in duty bound, I write this for the information of the *Yamên*.

"A necessary despatch, &c."

This attempt to reinstate the Respondent was frustrated by his

own hostile proceedings. On the 27th of November, the Respondent wrote to the Appellant a Letter, in which he says:—

"Your refusal to settle the differences pending between us, either by fair arbitration or amicable arrangement, imposes on me the necessity of submitting them to a legal decision. With this view I intend proceeding to *Shanghai* to-morrow, and I, therefore, request that you will be pleased to inform the Imperial Government with both the occasion for, and the object of, my temporary absence from the capital."

He added that there could be no objection, as he was told in 1867 that Students would not be ready to join the astronomical class for seven or eight years.

This Letter was reported, as the Respondent desired, to the *Tsung-li-Yamên*, and the action taken by them upon it appears in the following despatch from that Board to the Appellant:—

"The *Yamên* to Mr. *Hart*, Inspector-General of Customs.

"(No. 375.) "*November* 29, 1869.

"On the 23rd of November the *Yamên* received a despatch from the Inspector-General, reporting that, having reference to Professor *Von Gumpach*, who, according to an intention formed in June, 1868, having resigned his appointment, was to have gone home. President *Martyn* had stated that Mr. *Von Gumpach*, still in *Peking*, disputes the Inspector-General's report concerning his resignation. The Inspector-General thereon proceeds to say, 'As Mr. *Von Gumpach* now maintained that he has never resigned, the *Yamên* is requested to consider the despatch reporting him to have resigned as not written.'"

"Just as the *Yamên* was drafting its reply, another despatch was received from the Inspector-General, dated 28th November, and which states:—

"The Inspector-General's last despatch, requesting the *Yamên* to cancel a former despatch reporting Mr. *Von Gumpach's* resignation, was duly communicated to Mr. *Von Gumpach* by President *Martyn*. Professor *Von Gumpach* has now written to say that it is his intention to leave *Peking* on the 28th of *November* to go to *Shanghai* to procure a legal decision in those matters wherein he considers the

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Inspector-General's action wrong, and he requests that the same may be reported to the *Yamên.*

"On the 28th, Professor *Von Gumpach* left *Peking.*

"In acting thus, and in leaving without permission, Professor *Von Gumpach* appears to the Inspector-General to be doing what, if allowed to pass unnoticed, may be harmful to the interests of the *Tung-wên-Kwan.* The *Yamên* is, therefore, requested to consider the matter, and issue instructions for the Inspector-General's guidance."

"Having received the foregoing report, the *Yamên,* in reply, has now to state that, in view of the action thus taken by Professor *Von Gumpach,* it is not fitting that he should be any longer retained as a Professor in the said College.

"The Inspector-General is accordingly hereby instructed to acquaint the President with the *Yamên's* decision, and to intimate the same to Mr. *Von Gumpach.*

"The *Yamên,* in conclusion, leaves it to the Inspector-General to be guided by circumstances in deciding whether or not to issue a year's pay and allowance for passage home to Mr. *Von Gumpach.*"

The decision of the *Tsung-li-Yamên* was notified to the Respondent on the 30th of November, and the correspondence appears to be closed by the two following letters from the Appellant's Secretary, Mr. *Campbell,* to the Respondent:—

"*Shanghae, December* 15, 1869.

"Dear Mr. *Von Gumpach,*

"Mr. *Hart* requests me to intimate to you that the President of the *Tung-wên-Kwan* has sanctioned the payment to you of salary for the period from the 1st *October,* 1869, to the 33th *November,* 1869, minus a sum of 158 *taels,* authorized to be paid on your account to Mr. *Edkins.*

"Believe me,

"Yours truly,

"*J. D. Campbell,*

"Chief Secretary.

"*John Von Gumpach,* Esq.,

"&c. &c. &c."

"*Inspectorate-General of Customs.*

"Sir, "*Shanghae, December*, 18, 1869.

"I am directed by the Inspector General of Customs to acknowledge your letter of the 17th instant.

"I am to hand you the inclosed cheque for 176 t. 2 m. balance of pay due to you at the end of *November* last.

"And, with reference to the concluding paragraph of your Letter, I am to inform you that the *Tsung-li-Yamên* has authorized the Inspector-General to decide, whether or not a passage home and a money allowance of one year's pay shall be given.

"I am,

"Sir,

"Your obedient Servant,

"*J. D. Campbell.*

"Chief Secretary.

"*Johs. Von Gumpach*, Esq.,

"*Astor House, Shanghae.*"

The misrepresentations alleged in the petition to have been made by the Appellant to the *Tsung-li-Yamên* are, "that the Plaintiff had asked to be relieved from his duties, and declined to perform them; and that he had absented himself from *Peking* at a time when his active services might be required at the College."

The proof that representations were made to the *Tsung-li-Yamên* in the terms alleged is not at all clear, particularly as to the part relating to the active services of the Respondent. But it is not necessary to examine minutely this proof in considering the grounds of objection to the direction of the Judge, which are stated in the rule for a new trial.

The direction, so far as it relates to the misrepresentations, was as follows:—

"The second issue was, whether Mr. *Hart*, by misrepresenting that the Baron (the Plaintiff) was absent from *Peking* when he was wanted, made a false statement, and did the Chinese Government dismiss him in consequence. It was a thing specially for the jury to consider, whether the representations were warranted by facts."

This is the whole of the summing-up on this issue (except as to damages), and their Lordships are of opinion, that it is clearly defective and erroneous. They think, in the lowest view that can

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be taken of the relations of these Gentlemen to the Imperial Government, and to each other, that the representations made by the Inspector-General were privileged communications in the ordinary sense in which those words are understood; that is to say, communications so far justified by the occasion on which they are made, that the inference of malice which *primâ facie* arises from defamatory statements is rebutted, and the burden of proving express malice thrown on the Plaintiff.

The Appellant was entrusted by the Government with the general superintendence of the College and its Professors, and it was his duty to make reports to the *Tsung-li-Yamên* upon matters relating to its management and welfare. The resignation of a Professor, his absence from *Peking*, and any avowed disinclination or refusal to perform the duties for which he was engaged, were matters which it would be within his province to report. Reports so made, although defamatory, are *primâ facie* justifiable, and the duty of making them rebuts the malice which the law implies, and renders proof of actual malice, that is, of some wrong and improper motive, necessary to the maintenance of an action.

It was not denied on the part of the Respondent that this qualified privilege attached to the communications made by the Appellant to the *Yamên*, but it was contended that the question was not properly raised by the form of the issues; and, further, that actual malice must be taken to have been found by the jury. The Supreme Court appear to have adopted this contention in discharging the rule for a new trial.

But in the view taken by their Lordships, the question of privilege was substantially involved in the issues to be tried. In technical strictness, perhaps, the Plaintiff ought to have alleged that the representations were malicious, but it may be taken, in substance, to be so alleged in the averment that the representations were wilfully false. If, however, this be assumed in the Plaintiff's favour, it follows that the proof must be the same on a traverse of that allegation as if malice had been expressly averred.

The Judge ought, therefore, to have explained to the jury the relation and position of the parties, and (assuming for the present the existence of a limited privilege only) he should have told them that the action would not lie if the statements were made honestly,

and in a belief of their truth, and that the burden was on the Plaintiff to prove they were not so made.

No such explanation, however, was given. The Judge only asked the jury, whether the Appellant had made false statements, and whether the representations were warranted by facts. The last question is clearly misleading. In cases of this kind, the question is not as upon a plea of the truth of the libel, whether the representations are true, or warranted by facts; but whether, although they may not be true, the Defendant might have honestly believed them to be so, and made them, without malice, in the discharge of his duty.

The material word "wilfully," which might have opened the minds of the jury, although, without explanation, imperfectly, to the real issue, was omitted altogether from the question. The Supreme Court, in supporting the direction, say it was not necessary to ask the jury whether the representations were "wilfully" false, because they had the paragraphs before them which distinctly charged the Defendant with making wilfully false statements. Their Lordships cannot concur in this opinion and relieve the summing-up from the objection made to it on this ground.

The consideration of the Judge's direction by their Lordships has hitherto proceeded on the assumption that there was evidence proper to be left to the jury, and on that assumption it appears to them to be wrong; but, on reviewing the proof offered at the trial, they have come to the conclusion that there was no evidence of malice to sustain the action.

Their Lordships have carefully gone through the evidence and correspondence, and have not found any acts or expressions of the Inspector-General which indicate bad, or even unfriendly feeling towards the Respondent; on the contrary, he appears to have given consideration to his complaints and remonstrances, explained to him, from time to time, the difficulties attending the formation of the School of Astronomy, and shewn a desire to mitigate the disappointment occasioned by the delay. When the Respondent expressed a wish to return to *Europe*, the Appellant did not press him to do so, but appears to have been willing either to retain him as a Professor, and provide some employment for him in the College, or to accept his resignation and facilitate his return to

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England, offering, in the latter case, allowances which shew that he was not dealing with him in a harsh or unfriendly manner. It is to be observed, that the Respondent himself, in his evidence at the trial, does not suggest that any unfriendly feeling existed or was shewn to him. On the contrary, he says: "I believe Mr. *Hart* had the best intention to carry out the schemes proposed."

It was contended that the representations themselves supply evidence of malice. It is no doubt true that malice may in some cases be inferred from the defamatory statements themselves; but where representations, if *bonâ fide*, are privileged by the occasion on which they are made, the mere circumstance that they are defamatory does not furnish that proof:—it must be shewn, either from the nature of the language employed, or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice, they must be inconsistent with *bona fides* and honesty of purpose. (The cases on this point were cited and their authority recognised by this Board in *Laughton* v. *The Bishop of Sodor and Man* (1).)

The representations in this case afford no intrinsic evidence of malice. They relate only to the conduct of the Respondent as a Professor of the College, and it would be the duty of the Appellant to make them to the *Tsung-li-Yamên*, if they were true, or he believed them to be so. But it is said the evidence proves they were untrue in fact. Their Lordships are by no means satisfied that it does, on the contrary, there is much which leaves the impression, if that had been the question, that the Respondent had really resigned his appointment.

With regard to the statement respecting the Respondent's absence from *Peking*, their Lordships have been unable to find the evidence of what the exact representation was. If it related to his going to *Shanghai*, there was foundation for it.

Undoubtedly, however, if the truth of the statements had been the issue to be tried, it would have been proper to leave the evidence to the jury; but that, as already observed, is not the issue. The question is, whether the statements are so groundless that they afford evidence that the Appellant knew and believed they

(1) *Post*, p. 495.

were untrue, and acted from malicious motives in making them. Their Lordships think that the Appellant might have honestly believed he was reporting what was substantially true, and that there is no evidence from which it can be reasonably inferred that he was acting otherwise than in the *bonâ fide* discharge of what he conceived to be his duty. But it is enough to say that it is consistent with the evidence that such were his belief and motives, in the absence of any proof that he really entertained hostile or unfriendly feeling towards the Respondent. The Respondent, therefore, failed to sustain the burden, thrown upon him by the law, of proving actual malice.

Having come to the above conclusions, it is almost unnecessary for their Lordships to say that, if the only question on the rule had been, whether the verdict was against the evidence, they must on that ground have directed a new trial. They now advert to this part of the rule, chiefly because the Court in their judgment seem disposed to renounce the exercise of the power to grant new trials in cases of verdicts against evidence, except where they are "evidently perverse." The Judges refer to the possible inconvenience of a single Judge having to exercise it. Their Lordships think the Court ought not thus to limit their discretion. Undoubtedly, whether the Court is composed of a single Judge, or many, the verdicts of juries should not be disturbed, unless the Court can come to a clear conclusion, on definite grounds, that they are wrong. But when this conclusion is arrived at, it would be the duty of the Court, in many cases, to act upon its own opinion. The Judges below may, perhaps, have intended to allow a wider meaning to the terms "perverse verdicts" than is commonly given to them, but if the rule apparently laid down by their judgment should be really acted on, verdicts founded on mistake or prejudice would be, in effect, irreversible.

Their Lordships now come to the consideration of the 22nd and 24th paragraphs of the answer, which were ordered to be struck out on demurrer.

The 22nd paragraph alleges, in substance, that the Appellant and Respondent were in the employment of the Chinese Government, and that it was the duty of the Appellant to report to the *Yamên* upon the conduct of the Professors of the College, and that,

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in the exercise of such duty, and as an act of duty, and not otherwise, he made the representation complained of.

The 24th paragraph is to the effect, that it was the Respondent's duty, by virtue of his employment by the Chinese Government, to superintend the affairs of the College, and the Foreigners connected therewith, and to make such representations and reports as to him in his discretion should seem fit in the premises (not alleging to whom), and that the representations complained of were made in the exercise of his lawful authority, and of his duty as a servant of the Chinese Government, and in pursuance of no other object.

These paragraphs, in their Lordships' opinion, state relevant facts to raise the issue that the reports were, from the relation of the parties to the Chinese Government, privileged in the limited sense before explained. The Court below struck them out, on the the ground that they must be taken to admit that the reports were wilfully false and, by implication, malicious. This is not clear upon the construction of the paragraphs themselves; but, looking at them with reference to the Rules which regulate the nature and form of pleading in the Court below, their Lordships think that the Order to strike them out ought not to have been made. According to these Rules, pleadings are to be in the form of petitions and answers. The petition is to contain a narrative of the facts relied on, divided into paragraphs. The answer is to shew the nature of the defence; it must deny the material allegations intended to be questioned, and allege "any matter of fact not stated in the petition on which the Defendant relies." This is not analogous to the English system of pleading in the Courts of Common Law, where, in general, each plea is separately regarded, and must furnish a complete answer independently of all other pleas on the Record. The paragraphs of an answer are not in the nature of such separate pleas, and, unless where clearly so intended, should not be so treated. Cases may obviously occur where justice would not be done unless the paragraphs of an answer were read together. In this case the Appellant, in one part of his answer, denies that the representations were wilful and false, and in the paragraphs in question alleges facts, shewing under what circumstances they were made. Their Lordships con-

sider that both parts of the answer should have been allowed to remain on the Record; and that, if necessary to do so, in order to ascertain the questions to be tried, the Court should have settled the issues under Rule 58 of the Rules relating to the practice of the Court. If this course had been followed, the miscarriage which occurred at the trial would probably have been avoided. On the ground, therefore, that these paragraphs of the answer allege matters relevant to the defence, their Lordships think that the order for striking them out ought to be set aside and the paragraphs restored to the Record.

The opinion expressed by their Lordships upon the point hitherto discussed is sufficient to dispose of both the rule and the demurrer, in favour of the Appellant. But it was contended on his behalf that he was entitled to judgment on the demurrer, not merely on the ground of the limited privilege above explained, but on the higher ground that the facts alleged in the answer were sufficient to establish an absolute privilege, precluding an inquiry by an English Court of Law, or at least by the Queen's Court established in *China*, into any report, however wilfully false, and malicious, made under colour of his office by the Appellant to the *Tsung-li-Yamên*, concerning the Respondent as a Professor of the College.

Their Lordships however think that the answer does not contain sufficient facts to enable them to give judgment for the Appellant on this ground.

It was argued that what had been done was an act of State, and, therefore, beyond the cognisance of a Municipal Court. But the wrong complained of is not an executive act of the Chinese Government, nor of the Appellant as its Agent. The action is founded not on the dismissal of the Respondent from his post, but on alleged false and wrongful representations which are said to have led to it. If the power to dismiss had been delegated by the Chinese Government to the Appellant, and he had, from whatever motives, discharged the Respondent by virtue of that authority, it may be that his act should be regarded as an act of the Government. But it is not necessary to consider the supposed case, or the principles which determine the effect of the acts of Sovereign powers, and their Agents, since the wrong com-

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plained of does not in their Lordships' view fall within that category. The dismissal in this case was the act of the *Tsung-li-Yamén*, and the legality of their act is not in any way impugned.

A further contention on this part of the case was, that questions of this kind arising between Officers in the service of a Foreign Government ought not to be entertained by an English Court, although the litigants might be English subjects. It was urged that it would be against public policy and the comity of nations to allow of such inquiries.

This contention opens a question of great importance; but their Lordships think that, in the present case, the facts stated in the answer are insufficient to raise it.

By the law of England, actions for libel, and other personal wrongs arising in Foreign Countries, may be brought in an English Court; and any special circumstances which preclude the Court from entertaining them should be shewn (see *Mostyn* v. *Fabrigas* (1), and the Notes to that case in 1 Smith's Leading Cases, p. 623 [6th Ed.], and *Scott* v. *Lord Seymour* (2).

Now, the answer does not state what are the laws and customs of *China* with reference to reports of this kind, nor whether any protection is allowed to the officers making them, nor what specific privileges were accorded to the Appellant as a servant of the Chinese Government. It does not allege that he was a Minister, with the duty of advising on affairs of State, or even that his reports were confidential, or that it is contrary to the law or policy of *China*, or the usages of the service, to allow a subordinate Officer, if maliciously defamed, to seek redress in the Courts.

It was admitted that the present case was one of the first impression, and no decision could be found which governs it. The immunity accorded to Judges, Counsel, and others engaged in the administration of justice, against actions for statements made in the course of duty, and the recent case of *Dawkins* v. *Lord Paulet* (3), in which the same protection was extended to reports made by a military officer for the information of the Commander-in-Chief, were referred to. The immunity in these cases

(1) Cowp. 161. (2) 1 H. & C. 219.
(3) Law Rep. 5 Q. B. 94.

rests upon grounds of public policy and convenience: the object being to secure the free and fearless discharge of high public duty in the administration of justice, and the maintenance of military discipline, on which the welfare and the safety of the State depend.

The principle of this rule may be capable of application to cases other than those already brought within it, but it does not seem apposite to the circumstances of the present.

Considerations of public policy arise, if at all, in this case upon the suggestion that it is contrary to the comity of nations, and therefore against the public interests of this country, to entertain a suit involving an inquiry into Reports made by an officer in the service of a foreign State to the Government of that State.

Their Lordships are not prepared to say, that cases may not occur in which effect should be given to these considerations. If it were shewn, that by the law and customs of *China* officers in the service of the Government were absolutely protected in making Reports concerning their subordinates, and that it was against the policy of the Empire to allow them to be questioned by any Court, it might be proper to hold that it would be contrary to the comity of nations, and, therefore, against our own public policy, having regard to this comity, to allow a subject of the Queen, who had voluntarily entered into that service, to maintain such an action as the present. But this is not shewn; and if the law and customs of *China* should be otherwise, and it is not the policy of that Empire to prevent redress for a wrong inflicted under the colour of official reports, in the case of such a servant as the Appellant appears to be, then it may well be that nothing would be found in English public policy to preclude the Queen's Courts from entertaining the action between her own subjects.

It was then insisted that, if the Queen's Courts in *England* might entertain the action, it would still be contrary to the spirit of the Treaty of *Tientsin*, which authorized the Queen to establish Courts of Justice in *China*, that her Court so established should take cognizance of it. Their Lordships are unable to find in the Treaty sufficient grounds for this contention.

By Article XV., "All questions in regard to rights, whether of property or persons, arising between British subjects, shall be

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subject to the jurisdiction of the British authorities;" and the effect of the Order of the Queen in Council establishing the Supreme Court, and declaring its powers and jurisdiction, is, that the law of England, as between British subjects, shall be administered in it. Their Lordships, therefore, are unable to declare that the same principles of law shall not be applied to the decision of the action in the Court below, which would have governed it, if brought in the Queen's Courts in *England;* especially when no act of the Chinese Government is impugned, and no law or custom of *China* is, for anything which appears, violated.

In case the action should again be taken to trial (which their Lordships cannot anticipate will happen) it will be the duty of the Judge to rule that the reports were privileged in the limited sense above explained, and that the action cannot be maintained without proof of express malice; and, if the same evidence only is given, to direct a verdict for the Defendant, on the ground that it does not afford such proof.

Their Lordships desire also to point out that, in their view, the evidence fails to connect the dismissal with the alleged false representations. The first of them, relating to the Respondent's wish to be relieved from his duties, and declining to perform them, was made long before, and there is really no proof that it led to the dismissal, which proceeded on the fact that the Respondent had gone to *Shanghai* without permission for the purpose of taking legal proceedings. It was "in view of the action thus taken by the Professor," to use the words of their despatch, that the *Tsung-li-Yamên* decided "it is not fitting that he should be any longer retained as a Professor of the College." It is to be observed, that it was not at all likely he would be retained after he had taken this hostile step.

It only remains to consider the money demand. It appears that the Chinese Government were willing to pay 176 *taels* to the Respondent, as the balance of his salary to November, 1869, and a cheque was sent to him by Mr. *Campbell* for that amount in the letter of the 18th of December, 1869. It does not clearly appear on whom it was drawn. It was suggested that the fund out of which it was payable was in the hands of the Bankers of the Government, and that the cheque was not paid owing to the

refusal of the Respondent to give the receipt required of him; but, however this may be, there is no evidence that the Appellant had received the money, and held it, as the Agent of the Respondent.

This point was not raised by the rule for a new trial; but that is not now material, for, the rule being made absolute, the entire verdict will be set aside. Their Lordships think it right to state that, in their opinion, no evidence whatever appears to support this claim. They think also, the 23rd paragraph of the answer, which alleges that the money was entrusted to the Appellant as the servant of the Government to be disposed of at his discretion, is a clear answer to the demand, as it negatives that the Appellant held the money as the Respondent's agent or to his use. The paragraph, therefore, ought not to have been struck out on demurrer.

In the result, their Lordships will humbly advise Her Majesty to direct that the Order made upon the demurrer ought to be reversed, and that the demurrer ought to be disallowed with costs; and also that the Order discharging the rule *nisi* to set aside the verdict should be reversed, and that in lieu thereof it should be ordered that the verdict be set aside, and, if the parties so desire, that there be a new trial of the cause.

The Respondent must pay the costs of this appeal.

Solicitors for the Appellant: *Murray & Hutchins.*

Proctors and Attorneys for the Respondent: *Brooks & Co.*

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Nov. 7, 8, 9.

DAME MARIE LOUISE HERSE, ALIAS LOUISE HERSE, WIFE OF ANDRE ZEPHIRIN GROTHÉ, AND GROTHÉ . } APPELLANTS;

AND

JOSEPH DUFAUX, JUNIOR, ALIAS JOSEPH MARIE DUFAUX, MARGUERITE DUFAUX, WIFE OF JOSEPH CLET ROBILLARD, AND ROBILLARD . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Law of Lower Canada—Deed of donation inter vivos—Gift by Father to Son—Law of substitution—Héritiers—Droit de retour—Civil Code of Lower Canada in respect to gifts inter vivos.

P. R., in 1825, by a notarial instrument, in the nature of a Deed of donation *inter vivos*, gave his Son, *J. R.* a certain piece of land, reserving the usufruct to himself for life, with remainder to *J. R.* for life (both life interests being expressed to be "*à titre de constitut et précaire sa vie durante*"); and after *J. R.*'s death, to his children born in lawful wedlock; in default of such "*la propriété demeurera et appartiendra aux autres héritiers du dit donateur qui en jouiront et disposeront conformément à ce qu'il en aura disposé et ordonné par son Testament et ordonnance de dernière volonté.*" By a Will of previous date, confirmed by a Codicil made after the date of the Deed of donation, *P. R.* gave to his Son, *J. R.*, the enjoyment and usufruct during his life of all the property, moveable or immoveable, which he *P. R.* should have at his death, the absolute interest in such property to pass at the death of *J. R.* to his children born in wedlock, with power in default of such children to *J. R.* to dispose of such property at his discretion, and without being bound to follow any rule of equality or proportion, among the Testator *P. R.*'s Grandchildren, who were to be content with the share to be assigned them. *J. R.* died without children, and by his Will bequeathed, with other property, some of the land comprised in the Deed of donation by *P. R.* in his favour, to two only of the Grandchildren of *P. R.*

In a suit by another of *P. R.*'s Grandchildren, claiming a portion of such land as heir by substitution under the terms of the Deed:—*Held*, by the Judicial Committee, affirming the judgment of the Court of Queen's Bench of *Lower Canada*, that notwithstanding the words "*à titre de constitut et*

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* *Present*:—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

précaire sa vie durante" in the Deed of donation, *J. R.* became under it the institute, (*grevé,*) with a substitution in favour of his own children, and that the term "*autres héritiers*" operated only in the event of *J. R.* having no children, as a *retour* to the Donor, and made the property capable of passing by his Will, as also by the Will of his Son, *J. R.*

Exposition of the Civil Code of *Lower Canada*, with regard to gifts *inter vivos*, with reference to the text Writers on the ancient law of *France* and the *Code Napoléon*.

The Statute law of *Lower Canada* has engrafted on the old French law an unlimited power of disposition by Will.

The word "*Héritiers*" has there acquired a signification, wider than, and differing from, that which it would obtain in *France*.

BY a Deed of gift *inter vivos*, dated the 21st of May, 1825, made and executed at *Montreal* before Notaries, *Pierre Roy* (deceased) declared and acknowledged, that in consideration of the good and essential services which his Son, *Joseph Roy* (also deceased) had rendered to him, he made gift and donation to his Son, being present, and accepting for himself his heirs and representatives in future, a piece of land situate in the *Faubourg St. Laurent*, in the City of *Montreal*, with six Houses and other buildings thereon, to be enjoyed, used, dealt with, and disposed of by *Joseph Roy* "*à titre de constitut et précaire*" during his life, the enjoyment to commence only at the decease of the Donor, who reserved the enjoyment and profit of such piece of land during his life "*à titre de constitut et précaire*" only, and that after the decease of *Joseph Roy* the ownership of the piece of land should remain to his children born in lawful wedlock, and in default of children born in lawful wedlock of *Joseph Roy*, "*la propriété demeurera et appartiendra aux autres héretiers du dit donateur qui en jouiront et disposeront conformément à ce qu'il aura disposé et ordonné par son Testament et ordonnance de dernière volonté,*" it being understood nevertheless that it should be lawful for *Joseph Roy* to construct and erect on the piece of land or part of the same one or more Houses in stone or in wood, and of such dimensions as he should think fit, and to take and occupy for each House that he should choose so to build a piece of land and building site of 40 feet frontage by 90 feet deep, which he should be bound to inclose at his sole cost and charge with fences of planks or stakes of the height of 10 feet above the ground, and each and every piece of ground which *Joseph Roy* should choose so to take

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for building on as aforesaid, should belong to him in absolute ownership, with power to dispose of it by act *inter vivos* or by his last Will, according to his pleasure, provided that he did not sell or alien the lots of land during the life of the donor. This Deed was duly read, published, and registered.

The questions raised on this appeal were, first, as to the validity and effect of the above recited passage in the Deed of gift, and secondly, whether the Respondents, who claimed to be entitled under the Wills of *Pierre Roy* and *Joseph Roy*, were entitled to the entirety of so much of the piece of land as was not built upon and appropriated by *Joseph Roy*, under the power in that behalf contained in the Deed of gift, or whether the Appellant, *Marie Louise Herse*, as one of the co-heirs of *Pierre Roy*, was entitled to claim from the Respondents one moiety of such piece of land.

Pierre Roy, the Donor in the Deed of gift, previously to the date and execution of the above Deed, namely, on the 15th of December, 1821, made his Will, whereby he gave and bequeathed to his Son, *Joseph Roy*, the enjoyment and income during his life of all the property moveable and immoveable which he the Testator should leave at his decease, so that the ownership should remain to the children born or to be born in lawful wedlock of *Joseph Roy*, and in case he should not have children born in lawful wedlock, he should have power to dispose of the ownership of the property as well moveable as immoveable, according to his prudence and discretion, without being bound to follow any law of equity or of proportion amongst the Grandchildren of the Testator, who should be bound to be satisfied with the portion which should be allotted to them by *Joseph Roy* their Uncle.

Pierre Roy, the Donor, after the date of the Deed of gift made a Codicil to his Will, dated the 12th of December, 1831, and thereby, after his Will had been read over to him by one of the Notaries, in whose presence the Codicil was executed, confirmed his Will, and desired that it should be executed according to its form and tenor in everything which was not altered by such Codicil. This Codicil did not in any way alter the gift in the Will of the Testator's property, further than by giving certain legacies which were not material to the questions on this appeal.

Pierre Roy died the 16th of August, 1832, without having revoked or altered his Will, save so far as the same was altered or revoked by the Codicil, and the Will and Codicil were registered on the 4th of April, 1842.

Joseph Roy, the Donee in the Deed of gift, entered into possession of the piece of land therein comprised, and built upon a portion of the same piece of land of 40 feet frontage by 90 feet in depth, a House forming the corner of the *Rue Dorchester* and the *Rue Ste. Elizabeth*, and also built upon another portion of the same piece of land of 42 feet frontage by 90 feet in depth, a House forming the corner of the *Rue Sanguinet* and the *Rue Ste. Catherine*.

Pierre Roy, the Donor, had issue *Joseph Roy* and *Catherine Roy*, who married *Joseph Herse*, deceased, and there was issue of such marriage two children, the Appellant, *Marie Louise Herse*, and *Marie Marguerite*, afterwards the Wife of *Joseph Dufaux*, since deceased. The Respondents, *Joseph Dufaux*, junior, and *Marguerite Robillard*, were the only children of *Marie Marguerite Dufaux*.

Joseph Roy, the Donee, by his Will, dated the 2nd of September, 1848, gave and bequeathed to *Marie Louise Hélène Grothé*, his great niece, since deceased, a site situated in the *Quartier St. Louis*, of the City of *Montreal*, making the corner of the *Rues Dorchester* and *Ste. Elizabeth*, containing 40 feet frontage by 90 feet in depth, more or less, with a House, Coach-house, and other appurtenances constructed thereon, to be enjoyed, used, dealt with, and disposed of by *Marie Louise Hélène Grothé*, in absolute ownership, and as she should think fit at her age of majority after the Testator's decease; and the Testator gave and bequeathed to the Appellant, *Marie Louise Herse*, the enjoyment and income during her life, first, of a site situated in the *Quartier St. Louis*, containing 42 feet in depth, and being the corner of the *Rues Sanguinet* and *Ste. Catherine*, and further, the enjoyment and income during her life of another site situate in the *Quartier Ste. Laurent* of the City of *Montreal*, and therein particularly described, with a House and appurtenances thereon constructed, and as to the ownership of the two sites the Testator gave and bequeathed the same to the children born and to be born of the Appellant, *Marie Louise Herse*, whom he substituted by the Will, the sites to be enjoyed, used, dealt with, and disposed of by the children in absolute ownership,

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and as they should think fit, from the day of the decease of their Mother, and to be divided between them *per stirpes*, as from the day of the majority of the youngest of the children born and to be born of the Appellant, *Marie Louise Herse*, and he gave and bequeathed to the Respondents, *Joseph Dufaux*, junior, and *Marguerite Robillard*, his Great-nephew and Great-niece, issue of the marriage of *Joseph Dufaux* and *Marguerite Herse*, a piece of land situate in the *Quartier St. Louis* of the City of *Montreal*, whatever might be its contents, within the boundaries thereinafter shewn, adjoining in front the *Rue Dorchester* on one side, the *Rue Sanguinet* on the other side, and in rear, the *Rue Ste. Elizabeth*, deducting from the piece of land the two sites which were part thereof, and which he had above bequeathed, one to *Marie Louise Hélène Grothé*, and the other in enjoyment and profit to the Appellant, *Marie Louise Herse*, and in ownership to her children, with all and every erections which might belong to the Testator, and be found constructed on the piece of land; to be held, used, dealt with, and disposed of by his Great-nephew and Great-niece, in absolute ownership, and as they might think fit, from the day of the majority of the younger of them after the Testator's death, and then to be shared and divided between them. And after giving another legacy to the Respondents, *Joseph Dufaux*, junior, and *Marguerite Robillard*; as to all the rest of his property, moveable and immoveable, rights, choses in action, real and personal, and generally everything moveable or immoveable, which should belong to him at the time of his death, of whatever nature, quality, character, and situation, without any exception or reservation, after payment and discharge of his funeral expenses and debts, and the legacies thereinbefore contained, the Testator gave and bequeathed the same as to one moiety to the two children of his Niece, the late *Marguerite Herse*, the Respondents, *Joseph Dufaux*, junior, and *Marguerite Robillard*, to be divided equally between them, and to be enjoyed, used, dealt with, and disposed of by them in absolute ownership from the majority of the younger of them, and as to the other moiety of the residue of his property, the Testator gave the enjoyment and income of it to the Appellant, *Marie Louise Herse*, during her life, and as to the ownership of the moiety of the residue of his property, he gave

and bequeathed the same to the children born and to be born of the Appellant, *Marie Louise Herse*, whom he substituted to the property, to be enjoyed, used, dealt with, and disposed of by them in absolute ownership, and as they should think fit, from the decease of their Mother, and to be divided between them equally *per stirpes* from the majority of the youngest of them after the decease of their Mother. And, as the gift of enjoyment and income thereinbefore contained in favour of the Appellant, *Marie Louise Herse*, was to assist in providing for her children, and to be employed in sustaining, maintaining, and educating them, and also in the sustenance and maintenance of the Appellant, the Testator willed that the enjoyment and income should not in any case, or under any pretext, or for any reason whatever, be sold, parted with, or aliened in any manner whatever, or seized or arrested by any Creditor or other person, for any debt of the Appellant or her children or others, or for any cause or reason whatsoever, and it was expressly on that condition that he made the bequest of the enjoyment and income. And the Testator willed that if any one of his Great nephews or Great nieces should die without lawful children or issue, his or her share in his property should accrue to his or her lawful Brothers and Sisters surviving by representation of those deceased, to be enjoyed, used, dealt with, and disposed of in the same manner and subject to the same burdens and conditions on which they would enjoy, use, deal with, and dispose of their own shares of his property. And the Testator named *Etienne Alexis Dubois* and *Joseph Dufaux* to execute his Will, and constituted them Administrators of his property, to manage and administer his property until the majority of his Great nephews and Great nieces; and in case his Administrators did not agree in the administration of his property, he gave them power to divide between themselves the administration of the property, *Dufaux* to have the administration of the property belonging to his children, and *Dubois* to have the administration of the property given to the Appellant, *Marie Louise Herse* and her children, and of the site bequeathed to *Marie Louise Hélène Grothé*. And the Testator ordered, that if any of his Legatees or their issue should attempt directly or indirectly to impeach any one of the clauses and dispositions of his Will, such person should, *ipso facto*, be immediately

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deprived of all share and interest in his succession, and that the share of such person should accrue to his or her Brothers and Sisters who respected and were willing to execute the Testator's wishes and intentions.

Joseph Roy died on the 9th of October, 1848, unmarried and without having revoked or altered his Will, which was registered.

At his death, the Appellant, *Marie Louise Herse*, the surviving Grandchild, and the Respondents, *Joseph Dufaux*, junior, and *Marguerite Robillard*, as representing their Mother, *Marguerite Dufaux*, the deceased Grandchild of the Donor *Pierre Roy*, were the sole heirs of *Pierre Roy*, and would have been entitled to his undisposed of estate, if any, in the proportions following:—the Appellant, *Marie Louise Herse*, to one moiety thereof, and the Respondents, *Joseph Dufaux*, junior, and *Marguerite Robillard*, in equal shares to the other moiety thereof.

The site and House and piece of land by the Will of *Joseph Roy*, respectively bequeathed to the Respondents, *Joseph Dufaux*, junior, and the site and house by the Will first bequeathed to the Appellant, *Marie Louise Herse*, were the pieces of land comprised in the Deed of gift with the Houses built thereon by *Joseph Roy*.

At the date of the death of *Joseph Roy*, the Appellant, *Marie Louise Herse* had attained majority. The Respondents, *Joseph Dufaux*, junior, and *Marguerite Robillard*, were then minors.

On the 10th of October, 1848, a meeting took place between the Appellants and *Joseph Dufaux* and *Etienne Alexis Dubois*, at which the Appellant, *André Zephirin Grothé*, as Guardian of the children born and to be born of the Appellant, *Marie Louise Herse*, and the last-named Appellant, being authorized by her Husband, and also *Joseph Dufaux*, as the Guardian and on behalf of his infant children, the Respondents, *Joseph Dufaux* junior and *Marguerite Robillard*, signed in the presence of Notaries public, the preamble to an Inventory of the property of *Joseph Roy*, reciting, amongst other things, that having had the Will of *Joseph Roy* read to them, they declared that they agreed to the Will and approved and ratified it as far as concerned them in all its contents, and desired that it should have full and complete effect and be obeyed, according to its form and tenor, by all whom it might concern. After the preamble had been signed the Inventory and valuation

of the apparel and household goods of the deceased *Joseph Roy* was proceeded with and completed, and on the same day was signed by both the Appellants and by *Joseph Dufaux* in the presence of the same Notaries.

At the time when the preamble and inventory were signed by the Appellants the Appellant, *André Zephirin Grothé*, was aware of the existence and purport of the Deed of gift, and both the Appellants and *Etienne Alexis Dubois* were aware of such Deed of gift before the inventory and division of the property of *Joseph Roy* was closed as hereinafter mentioned.

The Appellants subsequently refused to proceed with the Inventory, stating in answer to the request of *Messieurs Dubois* and *Dufaux* that they should proceed and sign the same, "We do not think fit to sign at present; we will consider it; that is all your answer;" and they were, therefore, cited by Messieurs. *Dubois* and *Dufaux* to complete the Inventory and division, but neglected to attend, and in their absence the Inventory was closed, and division made of the property of *Joseph Roy* on the 8th of May, 1849.

Those portions of the estate of *Joseph Roy*, which, on the division of the estate were allotted to the Appellants in respect of the moiety of *Joseph Roy's* estate bequeathed to the Appellant, *Marie Louise Herse*, and her issue, and the other legacies and benefits given to the Appellant, *Marie Louise Herse*, since the death of *Joseph Roy*, were accepted and enjoyed according to the tenor of *Joseph Roy's* Will by the Appellants, who had, since the death of *Joseph Roy*, received and enjoyed the rents and income of the property moveable and immoveable the enjoyment whereof was left to the Appellant, *Marie Louise Herse*, by the Will; and had also accepted and taken the succession of the Appellant, *Marie Louise Herse*, as heiress of her Daughter, *Marie Louise Hélène Grothé* (who survived the Testator, *Joseph Roy* and afterwards died) to the site and house at the corner of the *Rue Ste. Elizabeth* and *Rue Dorchester*, bequeathed by *Joseph Roy's* Will to *Marie Louise Hélène Grothé*, and such site and house had been sold by the Creditors of the Appellant, *Marie Louise Herse*, for payment of her debts.

No step was taken by or on the part of the Appellants, or either of them, to set aside their ratification of *Joseph Roy's* Will, or to assert any claim to the property comprised in the Deed of gift, or

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any part thereof, other than such part of the same property as by the Will of *Joseph Roy* was bequeathed to the Appellant, *Marie Louise Herse*, for life; until the 10th of September, 1861, when they sued out the writ of summons whereby the action hereinafter mentioned was commenced.

From the death of *Joseph Roy* until the year 1861, the Respondents, by their Guardians during their minorities, and by themselves since they attained majority, had been in the peaceable and undisturbed possession of the piece of land and premises comprised in the Deed of gift, and the rents and profits thereof, except the two sites (parts thereof) which had been built upon by *Joseph Roy*, and which were by his Will bequeathed as to one moiety to *Marie Louise Hélène Grothé*, and as to the other for the benefit of the Appellant, *Marie Louise Herse* and her children.

On the 31st of January, 1853, the Appellant, *Marie Louise Herse*, in a suit instituted by her against her Husband, *André Zephirin Grothé*, for separation of goods, produced and gave in evidence the Inventory and division of *Joseph Roy's* estate, which had been made as before mentioned in order to establish her rights and claims against her Husband, and in that suit she sought by means of the Inventory and division to establish against her Husband her right to the property bequeathed to her by the Will of *Joseph Roy*.

All the transactions out of which the question on this appeal arose, took place, before the Civil Code of *Lower Canada* came into operation, the 1st of August, 1866.

On the 10th of September, 1861, a suit was commenced by the Appellants against the Respondents in the Superior Court of *Lower Canada*, District of *Montreal*, to recover in right of the Appellant, *Marie Louise Herse*, as co-heiress of *Pierre Roy*, one moiety of the piece of land comprised in the Deed of gift less the sites on which *Pierre Roy* had built on as aforesaid, together with the mesne rents of the moiety and damages, and by their declaration they alleged, that the Appellant, *Marie Louise Herse*, had never signed any ratification of *Joseph Roy's* Will, and that if any such ratification had been signed it was null and void by reason that the Deed of donation had been fraudulently concealed.

The Respondents by their pleas, after stating the Deed of dona-

tion and the Will and Codicil of *Pierre Roy*, and the Will of *Joseph Roy*, and the deaths of *Pierre Roy* and *Joseph Roy* without issue, pleaded that *Joseph Roy* by virtue of the power given to him by the Will and Codicil of *Pierre Roy*, was competent to dispose as he had done of all the immoveable property mentioned in the Deed of gift; that the Appellants had ratified the Will of *Joseph Roy*, by signing the inventory of his effects on the 10th of October, 1848; that as the Plaintiffs had allowed ten years and more to elapse without complaining of the act of the 10th of October, 1848, and without asserting its nullity, they could not complain of it, their action being barred in this respect by prescription; that the Appellants had not alleged any valid reason for annulling their act of the 10th of October, 1848; that before that time they knew of the Deed of donation; and that in consequence of their approval and ratification of the Will of *Joseph Roy* the Appellants could not sustain their action; and they also pleaded the general issue.

By an Order made in the suit, dated the 30th of April, 1864, the Respondents were permitted to amend their plea, by alleging that the Appellants had accepted the legacies contained in the Will of *Joseph Roy;* that they had taken possession of and still held the property which had been thereby given to them, and that they were consequently debarred of any right which they might have had of disputing any of the dispositions contained in the Will; and the pleas were amended accordingly.

Evidence having been entered into in the suit, the same came on to be heard in the Superior Court before Mr. Justice *Smith*, when that Judge declared that the Appellant, *Marie Louise Herse*, was and had been since the death of *Pierre Roy*, under and in virtue of the Deed of donation, proprietor of one undivided half of the piece of land, detraction being made of the two lots of land upon which *Joseph Roy* had built; and the Court appointed experts to divide the piece of land into two equal parts, and condemned the Respondents to pay the costs.

From this judgment, the Respondents appealed to the Court of Queen's Bench for *Lower Canada* (appeal side), and on the 8th of June, 1867, that Court, composed of the Chief Justice *Duval*, and the Justices *Meredith*, *Mondelet*, and *Drummond*, reversed the judgment of the Superior Court, and dismissed the claim of the

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Appellant, *Marie Louise Herse*, with costs, in both Courts. Mr. Justice *Drummond* dissenting.

The Appellant appealed from this judgment of the Court of Queen's Bench.

Mr. *H. Matthews*, Q.C., Mr. *Westlake*, and Mr. *Edmund Barnard* (of the Canadian Bar), for the Appellants :—

There are two questions in this appeal, the first regards the true construction and effect of the Deed of donation of the 21st of May, 1825, and the second is the alleged ratification of the Will of *Joseph Roy*, the Donor, by the Appellants signing the Inventory and valuation of his effects, having notice at the time of the Deed of donation, its purport and effect. The first question is, however, the material one, and that upon which both the Superior Court as well as the Court of Queen's Bench for *Lower Canada* founded their judgments. Did, then, the clause in the Deed of donation of the 21st of May, 1825, create a substitution (entail) or a *retour* (reversion), or did it comprise a substitution and *retour* combined? *Ordonnance des Substitutions* of 1747, Art. xii., xiii., and xv. The law of substitution under the *ancien régime* in *France*, which was the Law of *Lower Canada* until the Civil Code came into force on the 1st of August, 1866, after the institution of the present action, and does not affect the rights of the parties, is defined by *Ricard, Traité des Substitutions*, ch. 13, s. 2, and Part II. Nos. 117, 118, *et* 119; but is more fully treated of and illustrated by *Thévenôt D'Essaule*, who, in his *Traité des Substitutions Fidéi-Commissaires*, in page 5, says : "*La substitution fidéi commissaire doit être définie : une disposition par laquelle on gratifie quelqu'un, expressement ou tacitement, à la charge de rendre la chose à lui donnée, ou une autre chose, à un tiers que l'on gratifie en second ordre.*" And in page 9, he gives the results of this definition, which shew that whenever the gift is made to extend to the heir of the Donor it ceases to be a *retour*, and becomes to all intents and purposes a "fiduciary substitution;" and so strict is the law in carrying out this principle, that when the substitution became effete (*caduque*) by the death, incapacity, or renunciation of the substitute, the estate does not revert to the Donor, or to his heirs, but becomes vested in fee (*en pleine propriété*) in the institute (*grevé*) except under the peculiar

circumstances mentioned by *Thévenôt D'Essaule, Traité des Substitutions*, p. 175, *et seq.*; but which do not arise here. In the Civil Code of *Lower Canada*, which is applicable only in the present case when declaratory of the old law (Art. 925), the fiduciary substitution is defined to be (Art. 927), "That in which the person receiving the thing is charged to deliver it over to another, either at his death or at some other time," and the person charged to deliver over is called the institute (*le grevé*), and the one who is entitled to take after him is called the substitute (*l'appelé*). They also referred to and commented on Art. 779: *Troplong, Traité des Donations inter vifs et des Tests., Tom.* III. p. 199; *Code Nap.* Art. 951; *Troplong, Droit Civil expliqué* on the 951st Art. of *Code Civil, Tom.* II. pars. 1261 to 1269; *Chabot de l'Allier, Questions transitoires, Tom.* III. p. 206, *et seq.; Pothier, Trait. des Substitutions*, sect. 3, Art. 1; *Duranton; Cours de Droit Français, suivant le Code Civil, Lib.* 3, tit. 2, No. 29; *Furgoll, Sur les Donations, Quest.* XXX.; *Dalloz, Rep. de Jur.* Art. 1740; *Demolombe, Coms. de Code Nap., Tom.* XVIII., ss. 107, 111. The doctrine of election by English law is to be found in *Whistler* v. *Webster* (1); *Dillon* v. *Parker* (2); *Padbury* v. *Clark* (3). We contend, therefore, that the Deed of donation in question having divested the Donor of all his rights in and over the property comprised in the action, subject to the discretionary right which the Donor reserved, of regulating by a Will thereafter to be made the manner in which the substitutes should enjoy the property given to them, (which right he never thought proper to exercise,) all that property passed out of his estate and became wholly detached therefrom, upon the day of the date of the donation. The judgment, therefore, of the Superior Court was right as well upon the law as the facts of the case, and ought to be affirmed. Then there remains the question of ratification of the Will of *Joseph Roy*, by the receipt of a specific legacy, and the signing of the Inventory by or on behalf of the Appellants, with their knowledge and consent, which ratification, if made, is voidable by the Civil Code of *Lower Canada*, Art. 2114; neither the Superior Court nor the Court of Queen's Bench laid any stress on these circumstances, and it is

(1) 2 Ves. 367.
(2) 1 Swanst, 359; *Ibid.* note at p. 394.
(3) 2 Mac. & Gor. 298.

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unnecessary to argue the point, if, as we contend, and the Superior Court held, the Testator, *Joseph Roy*, had no power to deal with property which he had already irrevocably disposed of by the Deed of donation: and the fact, that he himself has not mentioned it in his Will or Codicil, or sought in any way to deal with it; the only power which he reserved to himself by the Deed of Donation being one which he did not think proper to exercise.

M. Dorion, Q.C. (of the Canadian Bar), and Mr. *Freeling*, for the Respondents:—

The true construction of the clause in the Deed of donation is that put upon it by the majority of the Judges of the Court of Queen's Bench. The case of the Appellants rests on the supposition that the first Appellant is the legal heir of *Pierre Roy*, as distinguished from a testamentary heir. The *Code Civil* of *Lower Canada*, Art. 597, which is declaratory of the law of *Lower Canada* before the *Code Civil*, includes both: our contention is, that the word "heir" in the Deed must be taken in its broadest sense; and we deny that the Donation created a substitution in favour of the heir of *Pierre Roy*, the Donor; it was only a *retour;* so that no one of them, as alleged on the other side, could thereafter be deprived of his share in the estate, either by *Pierre Roy* himself or by *Joseph Roy* his Son, making in fact the heirs of *Pierre Roy* who were to receive the property after the death of *Joseph Roy*, *grevés de substitution*, in favour of other *substitués*. Such a construction would defeat the plain intention of the original Donor, evidenced both by his Will as well as the Deed of donation. Both these instruments, as well as the Codicil, must be read together, in order to ascertain the meaning and intention of the original Testator. If the Deed of donation created only an ordinary substitution, then the property mentioned in it would wholly cease to form any part of the estate of the Donor, and would not have been subject to his Will. If the stipulation in the Deed of donation, that in the event of *Joseph Roy* not having children, the property should remain and belong to the other heirs of the Donor, who should enjoy and dispose of it in such manner as the Donor should direct by his last Will and Testament, would prevent the Deed from operating as an ordinary substitution, and secure to

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Pierre Roy the right of disposing of the property in the event of his Son, *Joseph Roy*, dying childless, in the lifetime of *Pierre Roy*, such contingency would have created a *droit de retour* of the property to *Pierre Roy*: *Troplong, Droit Civil expliqué, Tom.* II. pars. 1261 to 1269: but as *Pierre Roy* did not survive his Son *Joseph*, the right, if any, reserved to him under the Deed formed part of his succession at his death, and passed under the Will to *Joseph Roy*, who, as he died childless, could under his Father's Will dispose of the property as he did by his own Will. We say, therefore, that the substitution in favour of *Joseph's* heirs took effect by reason of his surviving his Father, *Pierre Roy*, and in the event, which happened, of his dying childless, gave his testamentary heirs title to the property the subject of the donation: Civil Code of *Lower Canada*, ch. IV. sects. 1–5; Ib. Arts. 620, 980; *Pothier, Tom.* VIII., tit. "Substitution," sect. III., Art. 2, par. 2, No. 83; *Thévenôt d'Essaules*, No. 742; *Troplong, Traité des Donations inter vifs et des Tests., Tom.* III. p. 203, Nos. 1262–3–4, p. 207, No. 1287; *Demolombe, Coms. de Code Nap., Tom.* XVIII., p. 122. As regards the effect of the signing the Inventory and accepting the legacies by the Appellants, we maintain, on the authority of *Roy* v. *Gagnon* (1), and Art. 2114 of the Civil Code of *Lower Canada*, that such acts were a direct ratification of the Will of *Joseph Roy*, and that the expiration of ten years from such ratification is an effectual bar to their setting up a title in opposition to his Will: Civil Code, Art. 2258.

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Judgment having been reserved, was now delivered by

SIR JAMES COLVILE:—

In the year 1825 *Pierre Roy*, then of *Montreal*, by a notarial instrument, dated the 21st of May, 1825, acknowledged and declared that he had made a donation by act *inter vivos* of a certain piece of land situate in one of the suburbs of *Montreal*, whereon five Houses had then been built, the rest consisting of meadow, orchard, and garden ground.

The terms of this Instrument, on the construction of which the principal question raised by this appeal depends, will have to be

(1) 3 Low. Can. Rep. 45.

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considered more particularly hereafter. It is not, however, disputed that the donation purported to be made by the Donor to his Son, *Joseph Roy*, his heirs and assigns, in acknowledgment and reward of services rendered by him; that in dealing with the beneficial enjoyment of the property the Instrument reserved the usufruct to the Donor himself for life, and afterwards gave it to *Joseph Roy*, also for life only (both life interests being expressed to be "*à titre de constitut et précaire sa vie durante*"); that it further contained a provision whereby any site, not exceeding forty feet of frontage by ninety feet of depth, on which *Joseph* might build a House, was to become his absolute property, subject to the stipulation that he was not to sell it during the Donor's life, and that the land, other than those parts on which *Joseph* should exercise this privilege, was effectually given after his death to his children born in wedlock. The question to be determined in this cause arises upon the construction of the provision which the act of donation made in the event, which happened, of *Joseph* dying without such children.

Pierre Roy, who seems to have been possessed of considerable property besides that which was the subject of the donation, died on the 16th of August, 1832. He left a Will, dated the 15th of December, 1821, and a Codicil dated the 12th of December, 1831. The latter is material only in that, being made after the donation, it expressly confirmed the Will which was made before the donation. His legal heirs were his Son, *Joseph*, and his Granddaughters by a deceased Daughter. The latter were *Madame Grothé*, the Appellant, and *Madame Dufaux*, the Mother of the Respondents. Whether, a third Granddaughter, *Catherine*, who is said to have died young and unmarried, was then alive, does not very clearly appear. She was alive at the date of the donation, but in the argument it has been assumed that she died before her Granddaughter.

The Will of *Pierre Roy* gave to his Son, *Joseph*, the enjoyment and usufruct during his life of all the property, moveable or immoveable, which the Testator should leave at his death; the absolute interest in such property to pass on the death of *Joseph* to his children born in wedlock; and it provided, that in default of such children *Joseph* should have the power to dispose of such property

at his discretion, and without being bound to follow any rule of equality or proportion, amongst the Testator's Grandchildren, who were to be content with the share so to be assigned to them. The Will contained further provisions to the effect that the share of any Grandchild dying without children born in wedlock should go to her uterine Sisters; and that if all should die without children born in wedlock, whatever they had received from the Testator should go over as thereby directed.

Joseph Roy died unmarried in 1848. By his Will, dated the 2nd of September in that year, he disposed, without making any express distinction between the three different classes of property of what belonged to himself in his own right; of what unquestionably passed under his Father's Will; and of the land which was the subject of the donation of May, 1825. The latter, with the exception of the sites upon which he had built two Houses, he gave to the Respondents, the children of *Marguerite Dufaux* (then deceased). Of the two sites and the Houses thereon he gave one to a Daughter of the Appellants, since deceased; and the other to the Appellant, *Madame Grothé*, for life, with remainder to her children. Of the whole mass of property disposed of he is said to have made, subject to a few legacies, a tolerably equal division, according to its then value, between the *Grothés* and the *Dufaux*. He vested the administration of his estates in a *M. Dubois* and *M. Joseph Dufaux* (the Father of the Respondents) jointly, but with a direction that if they could not agree they should divide the administration,—*Dubois* administering that part of the estate which was given to *Madame Grothé* or her children, and *Dufaux* administering the property given to his children, the Respondents, who were then minors. The Will also contained an express clause, that if any of his Legatees or their descendants should dispute any of the clauses or dispositions of the Will, he should forfeit his rights under the Will, which were in such case to pass to the co-legatees who should respect the Testator's last wishes and intention.

The Respondents have, under this disposition, been in the possession or enjoyment of the land in dispute since 1848, and the Appellant, Madame *Grothé*, has, under the circumstances to be afterwards considered, taken and enjoyed the benefits given by the Will of *Joseph Roy* to her. Nevertheless, on the 10th of September, 1861, she and her Husband commenced the action, which has given

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rise to this appeal, for the recovery of one moiety of the land included in the act of donation, exclusive of the portions built upon by *Joseph Roy*, with mesne profits and damages. The claim, as stated in the declaration, is, in effect, that by the act of donation of the 25th of May, 1845, one moiety of this land was effectually assured to the Appellant, Madame *Grothé*, as one of the legal heirs of *Pierre Roy*, subject to such directions touching the enjoyment of it as he might give by his Will; that he had given no such directions; and that the devise of the whole land by *Joseph Roy* to the Respondents was made without regard to the act of donation and in violation of the Appellant's rights. The declaration also endeavoured to meet, by anticipation, any defence that might be founded on an alleged ratification of the Will of *Joseph Roy*, by a notarial act of the 10th of October, 1848, by asserting that if that act was signed by the Appellants, which they denied, it was signed by them in ignorance of the act of donation, and of their rights under it; that they claimed, if necessary, to question its validity by an "*inscription en faux*;" and that it ought to be declared null, and of no validity, as against them; and no bar to their recovery of the moiety of the land in question to which they were entitled under the act of donation.

The defence by way of "*exception péremptoire*" insisted on the right of *Joseph Roy* to dispose, as he had disposed, of the land in question by his Will; and opposed a ten years' prescription to the claim of the Appellants to set aside the act of the 10th of October, 1848. By a subsequent proceeding of the 18th of April, 1864, the Respondents obtained a Judge's Order, made after hearing both parties, giving them liberty to add to their pleading allegations to the effect, that the Plaintiffs had accepted the legacy in their favour contained in the Will of the late *Joseph Roy;* that they had taken possession of the property so bequeathed to them, and still enjoyed it; and that they had thereby lost whatever right they might have had to contest any of the dispositions of the said Will.

The cause was heard in the first instance by Mr. Justice *Smith*, one of the Judges of the Superior Court, who decided it in favour of the present Appellants. The Respondents appealed from this judgment to the Court of Queen's Bench, which reversed it, and dismissed the Appellants' suit; one Judge of that Court,

Mr. Justice *Drummond*, dissenting. The appeal is from the last judgment. From what has been said, it is obvious, that the title of the Appellants depends upon the interpretation to be given to that clause in the act of donation which deals with the property in the event of *Joseph Roy* dying without legitimate children. The words of the clause are, "*Et à défaut d'enfans nés en légitime mariage du dit Maître Joseph Roy, la propriété demeurera et appartiendra aux autres héritiers du dit donateur, qui en jouiront et disposeront conformément à ce qu'il en aura disposé et ordonné par son testament et ordonnance de dernière volonté.*"

The record shews that upon this clause, taken in connection with the rest of the instrument, at least four different constructions have been put.

First: Mr. Justice *Smith* says, "The qualification made by *Pierre Roy* in the character of the enjoyment of *Joseph Roy*, viz., '*à titre de constitut et de précaire*,' clearly points out that it was not the intention of *Pierre Roy* to '*grever*' *Joseph Roy* with a substitution, but to give him a mere usufructary right of enjoyment, and to give the property directly to the children of *Joseph Roy*, if he had any at the time of his death, and in the event of his death without children, then and in that case, the property was to belong and go to the other heirs of the Donor, subject to the restriction expressed in the latter part of the donation. *Joseph Roy* died without leaving any issue. By the express terms of the donation, the property in question passed at once after his death to the heirs-at-law of *Pierre Roy*, and the enjoyment by *Joseph Roy* of the property during his lifetime only suspended the enjoyment of the heirs-at-law; but the title of the property vested in them by virtue of the donation itself, and it could not be taken away from them, or their title in any way touched, by the acts of either *Pierre* or *Joseph Roy*." And this construction is more fully expressed in the "considerations" upon which the formal judgment of the Superior Court is founded.

Second: Mr. Justice *Drummond*, the dissentient Judge in the Court of Queen's Bench, who held that the judgment of the Superior Court ought to be affirmed, construed the act of donation as importing a regular substitution in favour of the children of *Joseph Roy*, and in their default of the Donor's Grandchildren, as

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his other heirs, treating *Joseph Roy* as the institute, "*grevé*," with those substitutions. The right reserved to *Pierre Roy* to deal with the enjoyment of the property by his Will he considered to be at most a right to "*grever*" the substitutes with further substitutions, and in no way to imply a power to revoke the substitution altogether, and dispose of the property otherwise. The learned Judge in this adopted and concurred in the interpretation put upon the act of donation by *Maître Truteau* in the opinion of *Messieurs Peltier* and *Cherrier*, two *Avocats*, practising in *Lower Canada*, which opinion seems to have been used in the Court of Queen's Bench below, and is printed in and forms part of the Appendix.

Third: The interpretation put upon the act of donation by the majority of the Court of Queen's Bench seems to be, that it gave the property to *Joseph Roy*, "*grevé*" with a valid substitution in favour of his own children; but that in default of such children it created no further estates, but reserved to the Donor the power of disposing of the property by his last Will; and that such reservation was not contrary to law.

Fourth: The opinion of the Advocates, Messrs. *Peltier* and *Cherrier*, which has been somewhat irregularly introduced by consent into the record, is to the effect, that the act of donation created a valid substitution in favour of the legal heirs of the Donor, other than *Joseph*, but subject to a condition which the Donor had power to impose; and that the effect of that condition and of the Will of *Pierre Roy* taken together was to revoke the substitution, to bring back the property into the general assets of *Pierre Roy*; and to make it capable of passing under his Will.

The very able arguments which have been addressed to their Lordships by the learned Counsel on both sides have been mainly directed to establish either the second or the third of the above constructions. It seems to be now agreed that under the Deed of donation, notwithstanding the use of the words "*à titre de constitut et précaire*," *Joseph Roy* became to all intents the institute "*grevé*" with a substitution in favour of his own children; the only question being, what is the effect of the subsequent limitation. On this point, viz., *Joseph's* character of "*grevé*," the present case is almost identical with that stated by *Pothier* (*Traité des Substitutions*, sec. III, Art. 1) to have been decided in 1819.

It is desirable to determine in the first instance upon the construction of the Instrument what intention the Donor has expressed in the clause in question, without considering how far such intention was consonant with the law of *Lower Canada*.

The contention of the Appellants is, that the terms "*autres héritiers*" imports certain *personæ designatæ*, viz., the legal heirs of the Donor, other than *Joseph Roy* and his issue; that the clause operates as a valid and irrevocable substitution in favour of those persons, and that the last sentence of it is satisfied by supposing that the Donor reserved to himself the power of qualifying by his last Will the enjoyment of the property by his substitutes, to the extent even of making them "*grevés*" with further substitutions. This construction, therefore, admits an intention in the Donor to reserve to some extent a testamentary power over the subject of the gift; and *primâ facie* it seems more probable that if he reserved such a power at all, he would reserve one which enabled him to select the objects of his bounty, as well as to qualify and control their enjoyment of it. Do, then, the words admit of the latter construction? It may be granted that the terms "*les autres héritiers*," if found in a French instrument, would necessarily import the legal heirs of the Donor other than *Joseph Roy* and his issue to be ascertained at his death, even if they did not import the persons who were such presumptive heirs at the date of the gift. But it is to be observed that, owing probably in a great measure to the fact that the Statute Law of *Lower Canada* has engrafted on the old French law an unlimited power of disposition by Will, the word "*héritiers*" has there acquired a signification wider than and differing from that which it would obtain in *France*. The 597th Article of the Civil Code of *Lower Canada*, after defining *Ab intestate* succession and Testamentary succession, says, "The former takes place only in default of the latter;" and again, "The persons to whom either of these successions devolves is called heir" ("*est désigné sous le nom d'héritier*"). It follows from this, first, that it was competent to *Pierre Roy* at any time during his life, after the execution of the act of donation, to deprive his Grandchildren of the character of "*héritiers*" in the proper sense of the term; and that, in such case, if they took the subject of the donation by a valid substitution they would take it only because

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they were presumptive heirs, or *hæredes viventis*, at the date of the act; and secondly, that when using the term "*autres héritiers*" he may have meant the persons whom by his last Will he should constitute his heirs, or, in other words, that he may have intended to reserve to himself the power not only of qualifying the enjoyment of the persons who were to take in default of *Joseph Roy* and his issue, but of declaring who those persons were to be. Their Lordships agree with Chief Justice *Meredith* in thinking, that this latter construction is the true one, and that it is supported by other parts of the act of donation, particularly by that which declares the Donor's reason for making it to be his desire to acknowledge and reward the essential services rendered to him by his Son; a desire accomplished by an irrevocable gift in favour of *Joseph* and his issue. They also agree with that learned Judge in thinking, that some further confirmation of this construction is afforded by the provisions of the then existing Will, which, it may be presumed, the Donor had in his mind when he executed the act of donation—a Will which he afterwards confirmed by his Codicil, and ultimately left as the final expression of his wishes touching the disposal of his estate.

It is, however, contended, that the intention thus attributed to the Donor is inconsistent with the law of *Lower Canada* touching donations by acts *inter vivos;* and that the majority of the Court of Queen's Bench was in error in holding that the power, which it supposed the Donor had reserved, was one which he could lawfully reserve, and one which, in the events that happened, he had effectually exercised. These propositions are now to be considered.

It has been assumed that the effect of the act of donation was to create a fiduciary substitution ("*fidéi-commissaria substitutio*"), which completely satisfies the definition of such a disposition given by *Thévenôt d'Essaules de Savigny* in ch. i., sec. 2, of his Treatise; inasmuch as by it *Pierre Roy* passed the absolute property in the subject of the gift to *Joseph Roy*, who took some beneficial interest therein, but became "*grevé*" with the obligation to transmit on his death the thing given to third persons, viz., his children. And such a disposition, being made by act *inter vivos*, must be taken to be subject to the general rule of irrevocability which is expressed

in the old *Coutumes* by the words "*donner et retenir ne vaut.*" Again, for the trial of the question now under consideration it must further be assumed, that the "*fidéi-commissum*" in question is what *Thévenôt* (chapters xvii. and xviii.) terms "*simple*" and not "*graduel*," *i.e.*, that it extends only to one and not to several and successive classes of substitutes, the disputed clause being only the reservation of a right to the Donor, and the question being the lawfulness of such a reservation.

Their Lordships are of opinion, that for the law which obtains in *Lower Canada* they ought to look, in the first instance, to the Civil Code of that Province, which, though enacted after the commencement of this action, is admitted to be, when the contrary is not expressed, declaratory only of the law as it previously existed. And if this be so, it follows that the Works of learned French Authors, whether written before or after the promulgation of the *Code Napoléon*, are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Code; they cannot control its plain letter or express provisions.

The 755th Article of the Code says: "Gift *inter vivos* is an act by which the Donor divests himself, by gratuitous title, of the ownership of a thing in favour of the Donee, whose acceptance is requisite, and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law or a valid resolutive condition." Articles 811 to 816 explain what are the cases provided for by law, but none of them are material to the present question, unless it be the final clause of Article 816, which says: "The stipulation of all other resolutive conditions, when legally made, has the same effect in gifts as in other contracts." Again, Article 779 says: "A Donor may stipulate for the right of taking back ('*le droit de retour*') the thing given, in the event of the Donee alone, or of the Donee and his descendants, dying before him. A resolutive condition may in all cases be stipulated either in favour of the Donor alone or of third persons." Article 782 says: "It may be stipulated that a gift *inter vivos* shall be suspended, revoked, or reduced, under conditions which do not depend solely upon the Will of the Donor." And Article 783 says: "All gifts *inter vivos* stipulated to be reversible at the mere will of the Donor are void." It is obvious that the law thus declared, how-

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ever closely it may correspond with the ancient law of *France* as contained in the *Coutume de Paris*, differs materially from the law as it exists under the *Code Napoléon*. The latter prohibits substitutions altogether, and avoids the instrument which attempts to create one, but retains the principle of the irrevocability of a gift by an act *inter vivos*, subject only to a "*droit de retour*," which it thus limits and defines:—"*Le donateur pourra stipuler le droit de retour des objets donnés, soit pour le cas du prédécès du donataire seul, soit pour le cas du prédécès du donataire et de ses descendans. Ce droit ne pourra être stipulé qu'au profit du donateur seul.*" (See *Code Civil*, Articles 951, 894, 896.) Nothing is said in these Articles of any resolutive condition other than this limited "*droit de retour.*"

A resolutive condition (a term which comprehends the "*droit de retour*," however limited) is thus defined by *Dalloz, Répertoire de Jurisprudence*, Article 1740: "*Il y a condition résolutoire, en matière de donations, lorsque la donation se réalise immédiatement, avec tous les effets qu'elle doit produire, au profit du donataire, mais sous la clause que, si tel événement incertain arrive, la donation prendra fin, et que les choses seront remises au même état que s'il n'y avait pas eu donation. Le donateur, qui était maître de ne point donner du tout, peut évidemment ne donner que sous cette modalité. Mais quel sera l'effet de l'accomplissement de la condition résolutoire? On vient de dire qu'elle ne suspend point la réalisation de la donation: ainsi le donataire acquiert, dès à présent, la propriété même des biens. Mais lors de l'accomplissement de la condition, la donation sera résolue, c'est-à-dire que le donataire cessera d'être propriétaire des biens qui lui ont été donnés et livrés.*"

It is obvious from this passage that, when a resolutive condition takes effect, it operates as a revocation of the gift, and divests the Donee of the property in the subject of the gift, which the act of donation had conferred upon him. If, then, it was competent to *Pierre Roy* by the law of *Lower Canada* to stipulate, by way of resolutive condition, that in the event of his Son dying without lawful issue, the property should pass as he might direct by Will, there can be no difficulty as to the *modus operandi* of the condition when it took effect. The proprietary right in this land thereupon ceased to be in *Joseph Roy* or his heirs; it fell again within the dominion

of *Pierre Roy*, and became capable of passing with the rest of his estate under his Will.

Let us now try the legality of the supposed condition by the Articles of the Canadian Code. It does not sin against the principle of irrevocability, because its accomplishment does not depend solely on the Will of the Donor, but on the happening of an event over which he had no control, viz., the death of *Joseph Roy* without issue. If it be objected that it is not strictly a "*droit de retour*" within the meaning of the first clause of Article 779, because the event on which it depends is not that of the Donee and his descendants dying before the Donor; the answer is that it may nevertheless be "a valid resolutive condition" within the meaning of the subsequent clause of that section, which says that "A resolutive condition may be stipulated either in favour of the Donor alone, or of third persons." On the letter of the Code the supposed condition seems to be a valid one. It has, however, been strenuously argued on behalf of the Appellants that the illegality of such a condition is established by the authority of Writers like *Demolombe* and *Troplong*, who though they are professedly only commenting on the *Code Napoléon*, incidentally state what was the ancient law of *France* on this subject. Their Lordships desire to say nothing that may seem to derogate from the authority of these eminent Jurists. It is, however, obvious that the works cited do not profess to be a complete or authoritative exposition of the old law; and that if they were, it would not follow that the law of *Lower Canada*, during the long period that has elapsed since the separation of that province from *France*, has not more or less departed from the stricter rules which even before the *Code Napoléon* may have obtained in *France*. However, their Lordships are not satisfied that these Writers are so adverse to the contention of the Respondents as they have been represented to be. Both sides have appealed to *Troplong's* commentary on the 951st Article of the Civil Code, vol. ii, pars. 1261 to 1269. The Article is that which restricts the "*droit de retour*" within the limits above mentioned. And the general object of the learned Commentator is to shew how particular provisions may fairly be construed to be reservations of a "*droit de retour*" rather than substitutions; the consequence being that in the former case the reservation, if

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within the limits prescribed by the Code, will be operative; and, if beyond those limits, will be simply inoperative: whereas such provisions, if construed as substitutions, would vitiate the whole disposition. He applies this reasoning to a stipulation for a "*droit de retour*" to the Donor or his heirs, arguing that it was not because the latter was really a substitution, but because its consequences were similar to those of a substitution, that the *Code Napoléon* limited the benefit of a "*droit de retour*" to the person of the Donor, excluding his heirs. And he fully admits that by the ancient law such a reservation would have been valid, and that, if the Donor happened to die before it took effect his heirs might have claimed the benefit of it. He says, there will always be this essential difference between the '*droit de retour*' and a substitution, that in the former case the heir comes forward as the representative of the Donor and as exercising a right which would have come to him by reversion if an exceptional law had not deprived him of it; whereas the substitute is only a third person who is so far from exercising any rights of the Donor that the latter in making an institution and substitution, has shewn that he does not wish to retain any of his rights, but that he abandons them all. He adds, "*En un mot, dans le droit de retour, stipulé même au profit des héritiers, la chose donnée remonte vers sa source; dans la substitution, elle s'en éloigne; dans l'un elle est censée rentrer dans la succession du donateur défunt, comme si elle n'en fût jamais sortie; dans l'autre, elle passe dans un patrimoine étranger.*" *Troplong, Droit civil expliqué, Tom.* II. par. 1267, therefore, must be admitted as an authority in favour of the proposition, that a stipulation for a "*droit de retour*" to the Donor or his heirs was permitted by the ancient French law. He no doubt afterwards comes to the conclusion, that where the stipulation is for a "*droit de retour*" for the benefit only of a third person, whether heir or not, and without mention of the Donor, the stipulation is either altogether invalid, or can take effect only as a substitution; "*le donateur n'étant pas du tout dans la stipulation de retour.*" But on this it is to be observed that if the stipulation really imports the reservation of a power to the Donor on the happening of a certain contingency to dispose of the property by his Will, it is in substance a "*droit de retour*" to him, and his testamentary heirs, although he is not

expressly named in the condition; its effect being to bring back the property into his succession as if it had never gone out of it. And the objection founded on the mere letter of the stipulation, viz., that it does not in terms mention the Donor, can hardly prevail against the words of the 779th Article of the Canadian Code, which says, "A resolutive condition may in all cases be stipulated, either in favour of the Donor alone or of a third person."

Their Lordships having to deal with an instrument as to the construction and effect of which there has been so much difference of opinion amongst those conversant with such dispositions, and with the law to be applied to them, have naturally felt considerable doubt in this case. But the conclusion to which they have come is, that the construction put upon the disputed clause by the majority of the Court of Queen's Bench is correct; and that there is nothing in the law of *Lower Canada* which is repugnant to that construction, or to the effect given to it.

They may further observe, that even if the Appellants had succeeded in shewing that the reservation implied in the construction put upon the clause by the judgment of the Court of Queen's Bench was unlawful, they would not thereby have established their right to recover in this case. To establish their title they must shew that the clause constituted a valid and irrevocable substitution in their favour. That consequence does not necessarily follow, because the clause was not a valid resolutive condition, or even because it was not a resolutive condition at all. The argument for the Appellants assumed that the words might import the reservation of a power to the donor to "*grever*" the substitutes with further substitutions. Hence, if he did not intend to create, and did not create, an irrevocable substitution in favour of the other heirs, the clause may well be taken to reserve a power, which has not been duly exercised, to "*grever*" the institute *Joseph Roy* with further substitutions. But what would be the effect of holding either that the condition was altogether void, or that it reserved a power to create new substitutions in succession to the first, which had not been exercised? The effect would obviously be that there was no valid substitution after that in favour of *Joseph's* children; and that on the failure of that, the property became absolutely his, and capable of passing under his Will. On this view of the

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case it would be only necessary to qualify the grounds of the judgment, which would have to remain a judgment for the dismissal of the Appellants' suit. Their Lordships, however, have already intimated their opinion that the judgment, as it now stands, ought to be affirmed.

This being so, it is unnecessary for them to decide the question of ratification, and they abstain the more willingly from the consideration of that question, because they have not the benefit of the judgment of the Court of Queen's Bench upon it. They may, however, observe that whatever might have been their opinion as to the effect of the act of the 10th of October, 1848, they would have felt considerable difficulty in holding that there had not been "*acceptation tacite*" by reason of the receipt of the rents of the property bequeathed by *Joseph Roy* to Madame *Grothé*, and in distinguishing this case from that of *Roy* v. *Gagnon* (1). Nor, as at present advised, are they satisfied that Mr. Justice *Smith* was warranted in treating the amendment in the pleadings which had been made under a Judge's order, pronounced after hearing both parties, as "utterly irregular and insufficient to put the Plaintiffs to answer."

Their Lordships will humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Solicitor for the Appellants: *W. La Penotière.*
Solicitors for the Respondents: *Roberts & Simpson.*

(1) 3 Low. Can. Rep. 45.

ALFRED NELSON LAUGHTON . . . APPELLANT;

AND

THE HON. AND RIGHT REVEREND THE LORD BISHOP OF SODOR AND MAN } RESPONDENT.

J. C.*
1872
Nov. 15, 16.

ON APPEAL FROM THE APPELLATE COURT OF COMMON LAW OF THE ISLE OF MAN.

Bishop's charge in Convocation—Libel—Privileged communication—Actual malice.

The charge of a Bishop to his Clergy in Convocation is, in the ordinary sense of the term, a privileged communication; on the well known principle that a communication made *bonâ fide* upon any subject-matter in which the party has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable; provided that, the occasion on which the communication is made rebuts the *primâ facie* inference of malice, in fact, arising from a statement prejudicial to the character of the Plaintiff, and the *onus* is upon him to prove that there was actual malice, that the Defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

So *held*, where the Bishop of *Sodor* and *Man*, in a charge to his Clergy in Convocation, commented on a speech made by a Barrister in his character of an Advocate instructed to oppose a Bill before the House of Keys, promoted by the Government, vesting additional Ecclesiastical patronage in the Bishop, in which he impugned the conduct of the Bishop, and attributed to him motives and conduct unworthy of his character and position.

Held, also, that the circumstances of the case warranted the Bishop in sending such charge to a Newspaper for publication, and that such course being in self defence, rebutted any presumption of malice on the part of the Bishop. *Somerville* v. *Hawkins* (1), and *Spill* v. *Maule* (2) followed.

The cases of *Whiteley* v. *Adams* (3), and *Wright* v. *Woodgate* (4), recognised and affirmed.

THE Appellant, in this case, brought an action for libel against the Respondent in the Common Law Court of the *Isle of Man*.

The declaration contained three counts. In the first count, the

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

(1) 10 C. B. 583.
(2) Law Rep. 4 Ex. 232.
(3) 15 C. B. (N.S.) 392.
(4) 2 C. M. & R. 573.

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libel was stated to have been published by the Respondent at a general Convocation of all the Clergy of the Island, and in the second the libel was stated to have been published by the Respondent in a Newspaper called the "*Manx Sun.*" The third count was immaterial, and was abandoned at the Trial by the Appellant's Counsel. The Defendant did not plead, and by the Law of the *Isle of Man*, where there is no plea entered it is equivalent to a plea of not guilty.

The action was tried before his Honor, *John Clowes Stephen*, Esquire, Deemster, and a special jury, at the Common Law Court, at *Ramsay*, in the Island, on the 15th, and five following days of February, and the 1st and five following days of March, 1870.

The Deemster directed the jury, in effect, that both the reading the charge by the Respondent, and also the publication of it in the "*Manx Sun*," which was admitted at the Trial to have been done at the request and by the direction of the Respondent, were privileged, and that the jury could only find for the Appellant in case they thought that the Respondent had been actuated by malicious motives against the Appellant, and had exceeded his privilege; but if they thought there was such excess, then that they should give such damages as were commensurate with the excess. The jury returned a verdict for the Appellant for £400 damages.

The Respondent being dissatisfied with the verdict, entered a traverse of appeal, and a case was stated for the appellate Court. pursuant to sect. 5 of the *Island Appellate Jurisdiction Act*, 1867 (1).

The traverse, or appeal, was heard by the Common Law Court, in June, 1870. The Judges who heard the case being the Lieutenant-Governor, the President of the Court, Deemsters *Drinkwater* and *Stephen* (the Judge who had presided at the Trial), and the Clerk of the Rolls of the Island, and that Court, after argument,

(1) Section 5 enacts, that "The Court shall not on hearing a traverse consider any questions as to any determination, ruling, or direction of the Judge at the trial in matter of law unless the points or objections objected to or excepted to be stated in the form of a case in writing agreed to by both parties or their Advocates, or in case of their disagreement, to be settled by the Judge presiding at the trial, and signed by him, and filed with the proceedings in the cause or suit at least three days before the hearing of the traverse.

on the 29th of June, 1870, gave judgment to the effect that, whereas at the trial of the cause "the presiding Judge, the Deemster, charged the jury that if there was actual malice in the alleged libel—not malice in law, but actual ill-will against the Plaintiff, they ought to find damages for the amount of the excess;" "the Court is of opinion, that such charge is wrong in law, that the document complained of was an answer to a charge previously made by the Plaintiff in the action against the Defendant, that the *primâ facie* inference of malice was, therefore, rebutted, and that the burthen of shewing express malice lay upon the Plaintiff. The Court is further of opinion, that there was no evidence of express malice, and that the Deemster ought to have charged the jury to that effect, and to have told them, that it was their duty to find a verdict for the Defendant. It appears further to the Court, that no new trial can be ordered under the Act of *Tynwald*, the *Island Appellate Jurisdiction Act*, 1867, there being no question of fact nor any question as to amount of damages remaining between the parties. The Court, therefore, hereby order that judgment be entered for the Defendant, and that the Plaintiff do pay the costs of the action incurred up to and including the costs at the trial of the cause before the jury." The appeal was from this judgment.

The material facts, as they appeared in evidence, were these:—

The Appellant was a Barrister, practising in the *Isle of Man*, and a Bill having been introduced into the House of Keys, intituled "An Act for the division of the Parish of *Braddan*," he was instructed to oppose the Bill, at the Bar of the House of Keys, on behalf of certain inhabitants of the Parish who had presented a petition against it. The Bill had been introduced into the House of Keys by the Attorney-General of the Island, and would, if it had become law, have vested additional Ecclesiastical patronage in the Respondent. The Appellant appeared at the Bar of the House of Keys to support the petition, and, among other matters, animadverted upon the objects with which the Bill had been introduced by the Respondent; upon the effect of the Bill and upon the manner in which the Respondent had exercised his Ecclesiastical patronage; and otherwise upon the Respondent's management of his Diocese. The Bill was thrown out by the House of Keys.

The Respondent afterwards in his charge, in which the alleged

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libels were contained, read the same at a Convocation of Clergy, held in the Bishop's Court, on Whit Thursday, 1868 (1), and wrote to the Editor of the "*Manx Sun*" a Letter enclosing the charge for publication.

In the charge (amongst other things) the Appellant was represented as employing arguments and language not ordinarily used by any man of high professional repute when pleading before a common jury or a Parish vestry; of making slanderous statements and uncharitable imputations; of making false accusations under the apparent sanction of well informed persons; of making statements with entire disregard to truth; of being a wicked man; of making calumnious assertions; and of being guilty of the sin of bearing false witness against his neighbour.

At the trial of the action the Respondent called evidence for the purpose of shewing that the Appellant's manner and demeanour before the House of Keys were improper and irregular, and the Appellant entered into evidence to rebut this, and that what he had spoken was spoken strictly in pursuance of his instructions. The Appellant also tendered evidence to shew that what he had said with reference to the Respondent was in point of fact true, but this evidence was objected to by the Counsel for the Respondent.

Sir *John Karslake*, Q.C., and Mr. *H. R. Mansel Jones*, for the Appellant:—

The occasion on which the libels complained of were published afforded no privilege. Even if the charge to the Convocation was privileged, the publication of the charge in the "*Manx Sun*" Newspaper was clearly not a privileged communication. If it is contended that the libels were privileged by reason of an attack having been made upon the Respondent, and that the charge to Convocation was the Respondent's defence to such attack, still those parts of the charge complained of by the Appellant were not necessary for the defence, and were no answers to the statements made by the Appellant in his address to the House of Keys. This the Respondent admitted in his charge, which he stated was not written for the purpose of pleading his

(1) See judgment, *post*, p. 505, where the material parts of the Bishop's charge are set out *in extenso*.

own justification. The question of malice and excess of privilege, if there was privilege, was rightly left to the jury by the Deemster, and their verdict was conclusive against the Appellant: *Coxhead* v. *Richards* (1); *Hooper* v. *Truscott* (2); *Parmiter* v. *Coupland* (3); *Hibbs* v. *Wilkinson* (4). In *Dickson* v. *The Earl of Wilton* (5) Lord *Campbell* said, "Whether or not the occasion gives the privilege is a question of law for the Judge, but whether the party has fairly and properly conducted himself in the exercise of it, is a question for the jury:" *Cook* v. *Wildes* (6). The publication by the Respondent of his charge in Convocation in the Newspaper was evidence of malice for the jury; he had no privilege in defending himself to libel the Appellant; all that the Bishop was entitled to do, to exonerate himself from the charge of malice was to contradict the statements made by the Appellant; he had no right to impute motives; and the jury, in such circumstances, rightly found that there was malice, and their verdict was conclusive, and ought not to have been disturbed: *Duncan* v. *Davison* (7); *Campbell* v. *Spottiswood* (8); *Fryer* v. *Kinnersley* (9); *Starkie* on Slander and Libel [3nd Ed. by *Folkerd*], p. 289, where all the cases are collected: *Cockayne* v. *Hodgkinson* (10); *Woodward* v. *Lander* (11); *Toogood* v. *Spyring* (12); *Hunter* v. *Sharpe* (13). The course adopted by the appellate Court in the Island in directing judgment to be entered for the Defendant instead of entering a nonsuit, which would have enabled the Appellant to have brought his action again, was not merely irregular, but a grievous hardship and injustice on the Appellant, and can only be remedied by this Tribunal.

Mr. *A. J. Stephens*, Q.C., and Mr. *B. Shaw*, for the Respondent:—

In the absence of express malice, the Bishop's charge in Convocation, and its publication in the "*Manx Sun*" Newspaper, were

(1) 2 C. B. 575.
(2) 2 Bing. N. C. 457; S. C. 2 Scott, 672.
(3) 6 M. & W. 105.
(4) 1 F. & F. 608.
(5) Ibid. 426.
(6) 24 L. J. (Q.B.) 367.
(7) 7 E. & B. 229.
(8) 3 F. & F. 421.
(9) 15 C. B. (N.S.) 422.
(10) 5 C. & P. 543.
(11) 6 Ibid. 548.
(12) 1 M. C. & R. 181.
(13) 4 F. & F. 983.

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privileged. The charge was delivered by the Bishop in the exercise of his Episcopal and official duty, and the publication of it was the legitimate mode of making it known to his Clergy in general: *Wason* v. *Walter* (1). Unless, therefore, the Appellant can shew affirmatively, that there was express malice, malice in fact, as distinct from malice at law, the verdict against him was rightly reversed by the appellate Court in the *Isle of Man*. All the cases that have been cited by the other side go to prove, that there must be express malice to take the privilege away. Here there was no question of malice to be left to the jury. The language used by the Appellant in his address to the House of Keys far exceeded the limits of Professional privilege, or, Professional practice, such as we are accustomed to here; indeed it seems to have been disapproved of, though not checked, by more than one Member of the House; such aspersions on the Bishop's motives and actions required as well as demanded contradiction, and the remarks on the tone and temper of such aspersions were not only called for, but were required from the Bishop, in his own justification. The vindication of his character from such calumnies was both natural and justifiable, and the occasion he took to do it, namely, in a charge to the body of his Clergy assembled in Convocation, was a most proper and fitting one. Such a communication was in every respect a privileged one, and the question of malice cannot be inquired into: *Spill* v. *Maule* (2); *Wright* v. *Woodgate* (3); *Toogood* v. *Spyring* (4); *Taylor* v. *Hawkins* (5); *Somerville* v. *Hawkins* (6). The effect of the Act of *Tynwald* of February, 1703, which is the law of the *Isle of Man*, and has been recognised by the Legislature in 1813 and 1872, as of statutable authority, is to protect the Bishop from being accountable for any act done by him *bonâ fide* in Convocation: *Mills*, Statute Laws of *Isle of Man*, p. 161. In cases of privileged communications for publication, the question, we submit, to be left to the jury is, not whether there is no evidence, but whether there is any evidence that ought reasonably to satisfy the jury that the thing sought to be established, as the malice in this case, is proved:

(1) Law Rep. 4 Q. B. 73.
(2) Law Rep. 4 Ex. 232.
(3) 2 C. M. & R. 573.
(4) 1 C. M. & R. 181.
(5) 16 Q. B. 308.
(6) 10 C. B. 583.

Ryder v. *Wombwell* (1); *Jewell* v. *Parr* (2); *Toomey* v. *London and Brighton Railway Company* (3); *Wheelton* v. *Hardisty* (4). Applying the principles of these cases, we contend, that upon the fair construction of the Bishop's charge, in connection with the facts and circumstances of the case, the language used is not of such a nature as could enable this Tribunal to say, that there was any evidence on which a jury could reasonably have inferred malice: *Scott* v. *Stansfield* (5); *Lawless* v. *The Anglo-Egyptian Cotton Company* (6). There was no evidence of express malice for the Deemster to leave, as he did, the question of malice to the jury, and the jury's finding can, in no event, be allowed to stand; the Deemster's duty was to have explained to the jury that it was not necessarily unlawful for the Respondent to make statements having a tendency to injure and lower the credit of the Appellant, provided they were made *bonâ fide* in a belief of their truth, and in reference to his own defence against the attack made upon him. The jury were misdirected, and their finding was rightly set aside and reversed by the Superior Court.

Sir *John Karslake*, Q.C., in reply, cited *Davison* v. *Duncan* (7).

Judgment having been reserved was now delivered by

1872
Dec. 14.

SIR ROBERT COLLIER:—

This was an action of libel brought by the Appellant, who is a Barrister practising in the *Isle of Man*, against the Bishop of *Sodor and Man*.

The libel complained of is contained in a written charge read by the Bishop to his Clergy assembled in Convocation, and afterwards published by his authority in the "*Manx Sun*" Newspaper, a part of which charge purported to be a reply to a speech impugning the conduct of the Bishop addressed by the Plaintiff, as an Advocate, to the House of Keys in opposition to a Bill. The Bishop pleaded a general denial of the allegations in the declaration. The case was tried before one of the Deemsters and a special

(1) Law Rep. 4 Ex. 32–39.
(2) 13 C. B. 916.
(3) 3 C. B. (N.S.) 150.
(4) 8 E. & B. 262.
(5) Law Rep. 3 Ex. 220.
(6) Law Rep. 4 Q. B. 262.
(7) 7 E. & B. 229.

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jury. The Deemster, after defining the legal meaning of libel left it to the jury to say, whether the language of the charge was or was not a libel. He further thus directed them: "In my opinion the occasion upon which the alleged libel was committed was a privileged occasion, subject only to this—that if there was malice, actual malice, express malice, you will find a verdict against the Bishop for the excess." The jury found a verdict for the Plaintiff, with £400 damages.

This verdict was set aside by the appellate Court of the Isle, on the ground, that there was no evidence of express malice which the Deemster was justified in leaving to the jury, and judgment was entered for the Defendant, in pursuance of a power given to the appellate Court by a local Act, entitled the *Appellate Jurisdiction Act*, 1867.

It has been argued before their Lordships, that the delivery by the Bishop of his charge to the Clergy in Convocation fell within the category of communications absolutely privileged, with respect to which the question of malice cannot be inquired into, such as the charge of a Judge to a jury, or a speech delivered in Parliament.

Inasmuch, however, as one count in the declaration is founded upon the Bishop's sending a report of his speech to a Newspaper for publication, a proceeding certainly not entitled to such absolute privilege, the decision of this question could not dispose of the appeal, and their Lordships deem it enough in the present case to determine, whether or not the communication was a privileged one in the ordinary sense in which that term is used, that is to say, a communication made under such circumstances that the *primâ facie* inference of malice which the law draws from all libellous expressions is rebutted, and the burden of proving express malice thrown upon the Plaintiff.

In order to determine this question as well as that of express malice which arises if it be determined in favour of the Defendant, it is necessary to examine the character of the attack to which the charge of the Bishop purports to be a defence, and the circumstances under which that attack was made.

It appears that a Bill was prepared by the Attorney-General, under the direction of the Lieutenant-Governor, intituled "An Act

for the division of the Parish of *Braddan*." It is proposed to sever from that Parish as much of the Town of *Douglas* as is contained within it, dividing the severed District into three Parishes, and conferring on the Bishop the right of appointing Vicars to two of them, *St. George* and *St. Thomas*, reserving to the present Vicar of *Braddon* all fees and offerings to which he was entitled. It should be observed that a dispute was pending between the Bishop and the Vicar of *Braddon* as to the patronage of *St. Thomas'* Chapel, and that the Bill would practically have settled that dispute in favour of the Bishop.

This Bill was introduced into and passed through the Council, whereupon a public meeting was held, described to be of a somewhat excited character, in which resolutions were passed for petitioning the House of Keys against it; this meeting was addressed —it is said effectively—by Mr. *Laughton*, the Appellant, who was retained as Counsel to oppose the Bill before the House of Keys.

The purport of the speech of Mr. *Laughton* to the House of Keys, which is said by one of those who instructed him to have been made altogether in pursuance of his instructions, was to the following effect:—

He contended, that the Bill, though nominally that of the Attorney-General, was in reality that of the Bishop. That the Bishop, under the cloak of anxiety for the public welfare and the cure of souls, in reality sought only increased patronage for himself, at the expense partly of the Vicar of *Braddan*, his conduct to whom was described as an attempt "to take by violence the property of his neighbour." After enforcing these views, not only by argument, but by invective and sarcasm, much applauded by a large number of persons, who, as well as the members of the House, appear to have heard the speech, Mr. *Laughton* proceeded to a general attack upon the Bishop in these terms:

"His Lordship came here in 1854, and what has he done in the way of patronage? Has he so supported the *Manx* Church as to entitle himself to the support and confidence of the *Manx* Clergy and the *Manx* people? Has he advanced the spiritual interests of the Diocese over which he was appointed? Has he been careful in all ways to do that which would be for the good of the souls committed to his charge? Or has he not, by act after act, till the

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whole Island has echoed and re-echoed with cries of 'shame!' brought a foul stain and scandal upon the Church?"

He concluded his speech, during the course of which the Speaker of the House more than once intimated to him, that he was exceeding his province as an Advocate, in the following terms:—

"The report of the sentiments and opinions uttered here will go forth through the press; and, probably, from this time we may date the restoration of the *Manx* Church, and its future advancement may be substituted, for what has hitherto been decided retrogression."

It is to be observed, that he here refers not merely to the facts which he was instructed to state, and the arguments founded on them, but to "sentiments and opinions" which the Bishop may not unreasonably have supposed to have been uttered by him fully as much in his character of a *Manx* man, as in that of an Advocate.

It was to this speech, that the Bishop in the next assembling of his Clergy in Convocation thought it proper to reply, and their Lordships are clearly of opinion, that his charge was a privileged communication, in the ordinary sense of the term, on the well-known principle that a communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable: *Whiteley* v. *Adams* (1).

The Bishop had manifestly an interest in explaining and defending his conduct, if indeed it were not strictly his duty to do so, and the Clergy were deeply interested in that explanation and defence.

It does not necessarily follow that the publication of the charge by the Bishop in the local Newspaper was equally privileged. Considering, however, that the Laity as well as the Clergy are deeply interested in the character of their Bishop in his conduct of the affairs of his Diocese, and that the speech impugning his character and conduct had been addressed to both Clergy and Laity, and conveyed to both by the press, their Lordships are of opinion, that the Bishop was privileged in addressing his defence to both through the same channel which had conveyed the attack, pro-

(1) 15 C. B. (N.S.) 392. 10 Jur. N.S. 470

vided that he did this *bonâ fide* for the purpose of vindicating himself, or of informing the public upon matters which they were concerned to know, and not of defaming or injuring the Appellant.

For these reasons their Lordships agree with both the Courts of the Isle in holding that the communication was a privileged one in the sense before explained.

The only remaining question is, whether or not there was evidence of express malice on the part of the Defendant, which ought to have been submitted to the jury; not indeed a mere particle or scintilla of evidence, but such as could reasonably support a finding for the Plaintiff. Express malice, or as it is sometimes called "malice in fact," as distinguished from malice inferred by law, is defined by *Parke*, B., in *Wright* v. *Woodgate* (1), wherein he thus expresses himself: "The proper meaning of a privileged communication is only this; that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the Plaintiff, and puts it upon him to prove that there was malice in fact—that the Defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made."

It has been contended, that malice in this sense, is to be inferred from the language of the Bishop's charge, and undoubtedly a privileged communication may be couched in language so much too violent for the occasion as to afford in itself evidence of malice, whereby the privilege is forfeited.

The parts of the charge relied upon by the Plaintiff are the following:—

"The result of this unavoidable proceeding is now, unhappily, too well known. The Act was proposed by the Attorney-General of this Isle as a public Act; and he consented to make himself personally responsible for it; I declined to do so for reasons which I am not at liberty to state. Vested interests, and the spiritual welfare of the whole Town of *Douglas*, were carefully provided for, and a special clause was inserted preserving to the present Vicar of *Braddan* his alleged legal rights. After protracted discussions

(1) 2 C. M. & R. 577.

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this proposed measure was passed by the Council, and sent by the Lieutenant-Governor to the House of Keys.

"It grieves me much to be obliged to speak of the reception which it (the Bill) met with in this branch of the Insular Legislature. But regard for the Church of this Isle, for my own official influence in this Diocese, and for my own personal reputation, compel me to record, where alone I can speak on such a subject with becoming regard for the dignity of my office, my emphatic protest against the manner in which this proposed measure was treated by the House of Keys; and to express my surprise that any Legislative assembly, however constituted, should have deliberately, and with fore-knowledge of what was intended, permitted a gross personal attack to be made, in its presence, upon a member of the Council, without any previous notice being given him; and that it should have encouraged unproved charges against the Bishop of the Diocese, of a serious nature, to be made the basis of an argument for refusing even to consider the Bill as a public measure; and for treating it as a private Act, introduced by the Bishop of the Diocese, under false pretences, and with other objects than those which were clearly stated in the preamble of the Bill.

"If the statements to which I refer, and the language permitted in making them, had been addressed to any other audience in any other place, I should have treated them as unworthy of any serious attention. But when they were deliberately uttered by Counsel at the Bar of the House of Keys, pleading in behalf of one of my own Clergy and others; and when no member of that House challenged the accuracy of his statements of facts, though some protested against the intemperance of his expressions; and when arguments and language were employed with reference to myself which are not ordinarily used by any man of high professional repute, even when pleading before a common jury or a Parish vestry, the influence produced by such a proceeding, throughout so small a community as ours, is calculated to be of very serious consequence, indirectly, to the Church in this Diocese; and the practical result must be to deter me from making any other attempt to remedy, by local Legislation, any of those difficulties which have grown up among us, from time to time, affecting our

spiritual work, and which are becoming day by day of increasing importance.

"*Magna est veritas* is, however, an aphorism of general application, though it is sometimes very slow in counteracting the effect of slanderous statements, boldly made, and of uncharitable imputations: and we all know how any refutation, however complete, of false accusations, propagated under the apparent sanction of well-informed persons, frequently fails in having its due weight with ill-disposed persons, against the conclusions of preconceived prejudices and of foregone conclusions.

"Meanwhile *mens conscia recti* must be the solace of any public man who, in the discharge of his official duties, has to exercise authority in opposition to old customs, or to private interests, or to private judgment, as much as to his own personal inclinations; and *fiat justitia ruat cœlum* must be, in a special sense, his rule of action who is called to maintain order and discipline, as well as to teach unwelcome truths, in the household of a heavenly Lord and Master.

"It is not my intention, my Reverend Brethren, to plead, as it were, before you my own justification, in reply to the indictment which has been preferred against me in another place, under circumstances of a peculiarly grievous nature. You neither desire it nor need it. The time may yet come when a proper opportunity will be given me of exposing the entire disregard to truth which characterized the statements of which I have so much reason to complain. I can only remind you once more that the whole body of our Church must necessarily suffer by whatsoever impairs the functions of any one member thereof; and I think it hardly needful for me to assure you that, as I should feel it to be my bounden duty to defend the humblest Curate under my charge to the best of my ability, against any false imputations injuriously affecting his ministerial influence, so I am, for the Church's sake, constrained to protect the office which I hold from the assaults of wicked men; and this is the only time and place which enables me to do so with due regard to the dignity of my office; and what a learned Judge (*Coleridge*) has said, remains true, 'What does not withstand, has no standing ground.'

"Doubtless it is to such a feeling, or what we, in common par-

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lance, characterize as '*esprit de corps*,' or rather, loyalty to the Church, as a Church, and to each other as brethren, which impelled some of those who were directly or indirectly implicated in charges preferred against their Diocesan unjustly to state publicly facts in refutation of calumnious assertions: and, as far as it was in their power to do so, to correct mis-statements. To them some acknowledgment is due from me of an uncommon exercise of honour, and of courageous right feeling; knowing, as they must have done, that they exposed themselves thereby to misrepresentation of their *animus*, and their motives. It would have been well, in my judgment, for the Church and for themselves, if others having (as we all know they had) the power to do so had acted likewise; or rather been the first to set the example of doing so. However dignified such a course may be in a man who is conscious of his own integrity, self-complacency in treating the sin of bearing false witness against a neighbour with 'silent contempt' is not at all times, and under all circumstances, a sign of honourable manliness; especially not so, when public or private utterances are seemingly encouraged, which are manifestly prejudicial to the reputation and influence of a Brother or a friend, who bears with them, in common, though with various measures of responsibility, the title of 'fellow-citizen with the Saints, and of the household of God.'"

Some expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications.

The rule on this subject is thus expressed by the Court of Common Pleas in *Somerville* v. *Hawkins* (1): "It certainly is not necessary, in order to enable the Plaintiff to have the question of malice submitted to the jury, that the evidence is such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is neces-

(1) 10 C. B. 590.

sary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence."

The rule thus laid down has been since recognised by the Court of Common Pleas in *Harris* v. *Thompson* (1), by the Court of Queen's Bench in *Taylor* v. *Hawkins* (2), and more recently in *Spill* v. *Maule* (3) by the Court of Exchequer Chamber. In the last case the communication, *primâ facie* privileged, described conduct of the Plaintiff admitting of two interpretations as "dishonest and disgraceful." In delivering the judgment of the Court of Exchequer Chamber the Chief Justice thus expressed himself: "The presumption of law being in favour of the absence of malice by the Defendant, and the only evidence of malice being his description of acts done by the Plaintiff, which were capable of a two-fold construction, that presumption of innocence which attaches to the Writer must also, where his act is capable of a double aspect, still attend him. Starting with the presumption of innocence in his favour, we must presume that the Defendant did entertain that view of the Plaintiff's acts which induced him to believe, and honestly to believe, and say, that the Plaintiff's conduct was dishonest and disgraceful. We have not to deal with the question whether the Plaintiff did or did not act dishonestly and disgracefully; all we have to examine is, whether the Defendant stated no more than what he believed, or might reasonably believe; if he stated no more than this, he is not liable" (4).

Adopting the principle of these cases, their Lordships do not think it necessary to determine, whether or not the language of Mr. *Laughton* was such as is ordinarily used by Barristers of high reputation, nor whether or not the accusations against the Bishop were false, or false as to the knowledge of the Plaintiff or of those who instructed him, or whether they were preferred honestly or wickedly. It is enough that, having regard to the circumstances and nature of the attack upon him, the Bishop may, in their Lordships' opinion, have honestly believed that everything which he said was true, and proper for his own vindication, although, in fact, some of his expressions exceeded what was necessary for it; and that the language of his charge is more consistent with such

(1) 13 C. B. 333.
(2) 16 Q. B. 308.
(3) Law Rep. 4 Ex. 232.
(4) Ibid. p. 237.

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honest belief, and with the purpose of self-vindication, than with that of injuring the Plaintiff. This being so, the Deemster ought to have decided, in accordance with the case of *Somerville* v. *Hawkins* (1), that the language of the charge afforded no evidence of malice to be submitted to the jury. Had the Bishop referred to the conduct of the Plaintiff on any other occasion than that of his addressing the House of Keys, or made any general attack upon his private or professional character, the case would have been different. Some attempt was made to shew malice by evidence extrinsic of the Bishop's charge. His neglect to answer the Plaintiff's Letters was relied on in the Court below, but little before their Lordships, because the explanation was sufficient that the Letters were sent to the Bishop's legal adviser to be answered by him. It was contended that malice was to be inferred from the Bishop's Advocate objecting at the trial of the action to the proof of the truth of the Plaintiff's statement, and endeavouring to prove the impropriety of the Plaintiff's demeanour, but their Lordships concur with the appellate Court that no such inference could be properly drawn. Lastly, it was insisted that the sending of the charge to the "*Manx Sun*" was evidence of malice. This was, in itself, under the circumstances already adverted to, no such evidence, but if there had been evidence of malice *aliunde*, it would have been proper to put to the jury the question, whether the charge was sent to the Newspaper *bonâ fide*, or maliciously in the sense before explained.

For the above reasons their Lordships will humbly advise Her Majesty that the judgment of the appellate Court of the *Isle of Man* be affirmed, and this appeal dismissed with costs.

Solicitors for the Appellant: Messrs. *Gray, Johnston, & Mounsey.*

Solicitors for the Respondent: Messrs. *Park & W. B. Nelson.*

(1) 10 C. B. 575.

JOHN REDPATH AND OTHERS . . . . . APPELLANTS;
AND
JAMES ALLAN AND OTHERS . . . . . RESPONDENTS.

J. C.*
1872
Dec. 3.

THE "HIBERNIAN."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF LOWER CANADA.

Lower Canada, Law of—Statutes, 27 & 28 Vict. c. 13, s. 14, and 27 & 28 Vict. c. 58, s. 9—Collision—Compulsory Pilotage.

The Canadian Statute, 27 & 28 Vict. c. 13, intituled "An Act to amend the Laws respecting the navigation of Canadian Waters," enacts, by sect. 14, that "No Owner or Master of any Ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such within any place where the employment of such Pilot is compulsory by law;" and the Canadian Statute, 27 & 28 Vict. c. 58, s. 9, enacts, that "The Master or person in charge of each Vessel exceeding 125 tons, coming from a port out of the Province of *Quebec* and leaving the port of *Quebec* for *Montreal*, shall take on board a branch Pilot, for and above the harbour of *Quebec*, to conduct such Vessel, under a penalty equal in amount to the pilotage of the Vessel, which penalty shall go to the Decayed Pilot Fund:" *Held* on appeal, affirming the judgment of the Vice-Admiralty Court of *Lower Canada*, in a cause of damage by collision, that these Statutes are to be read and construed together as being *in pari materiâ*, constituting a compulsory pilotage, and exonerating the Owner of a Vessel having such Pilot on board from liability for damage inflicted on another Vessel.

Where a Statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination.

THIS was a cause of damage promoted by the Appellants, as the Owners of certain bags of sugar which were laden on board of two Barges called the *A. McFarren* and the *Dora*, against the Steamship *Hibernian*, owned by the Respondents, for the recovery of damages caused by the loss of the sugar by reason of a collision which happened between the Barges and the Steamship *Hibernian*.

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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THE "HIBERNIAN."

The collision happened shortly before noon on the 16th of June, 1868, in the River *St. Lawrence*, between *Pointe aux Trembles* and *Varennes*, off *Isle à l'Aigle*.

The *Hibernian* was a Mail steamer of 1391 tons register, and was proceeding down the *St. Lawrence* on a voyage from *Montreal* to *Liverpool*, with cargo and passengers.

The *Hibernian* was in charge of a duly licensed branch Pilot for the river *St. Lawrence*, whose duty it was to pilot her from *Montreal* to *Quebec*. The Barges were proceeding up the *St. Lawrence* in tow of a steam-tug boat called the *Canada*. The consequence of the collision was that the Barges sank.

By the Canadian Statute, 27 & 28 Vict. c. 13, s. 14, it is provided, that no Owner or Master of any Ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such Ship within any place where the employment of such Pilot is compulsory by law.

By another Canadian Statute, 27 & 28 Vict. c. 58, ss. 9, 10, relating to the Trinity House of *Montreal*, all Vessels of more than 125 tons burden navigating the *St. Lawrence*, between *Montreal* and *Quebec*, are bound to take on board a duly licensed branch Pilot, or to pay a penalty to the decayed Pilot's Fund equal to the amount that they would have had to pay for the pilotage. By sects. 2 and 3 of the same Statute, Pilots are required to pilot any Vessel for which they are engaged, and Masters of Vessels are allowed to choose what Pilot they would employ, subject to certain restrictions. By the Statute relating to the Trinity House of *Quebec*, 12 Vict. c. 114, s. 55, it is enacted, that any Vessel entering the *St. Lawrence* without a duly licensed Pilot on board, shall be bound to take the first duly qualified Pilot that offers, without any power of selection.

On the 11th of November, 1870, an action, which had been commenced by the *Northern Transportation Line*, as the Owners of the two Barges, the *A. McFarren* and the *Dora*, which had contained the sugar, for their loss, was consolidated with this cause of damage.

The case was heard before the Honourable *Henry Black*, C.B., the Judge of the Vice-Admiralty Court of *Lower Canada*, now the Province of *Quebec*, assisted by two nautical Assessors.

The facts which were proved with respect to the employment by the Respondents of the Pilot, were as follows:—

The Pilot, *Adolphe Lisée*, was licensed Pilot, and had been usually

employed by the Respondents since the year 1860, taking his turn with two other Pilots, who were also in their employ, in piloting the mail Steamers belonging to the *Montreal Ocean Steam Ship Company*, of which the Respondents were the Owners, between *Montreal* and *Quebec*. The Pilots so engaged were free from the duty imposed upon other Pilots for the Port of the *St. Lawrence* between *Montreal* and *Quebec*, of piloting any Vessels whose Owners engaged them with the consent of the Master of the *Montreal* Trinity House, but, being qualified branch Pilots, they occasionally piloted other Vessels when not employed in piloting the mail steamers.

The nautical Assessors, in reply to questions put to them by the Judge found, amongst other matters, that the collision did not arise from unavoidable circumstances, they stated, "that the Barges were sunk without any fault or defect attributable to them or their crews, or to the *Canada*, by which they were towed, and the blame rested with the *Hibernian* alone. That the collision did not arise from any fault of the Officers or crew of the *Hibernian*, but solely and exclusively from that of her Pilot," and that the *Canada*, her tows, and their crews, were not to blame for the collision, as it is known that a tug Steamer with so many Vessels in tow could alter her course readily, and the *Hibernian* having seen her so far off ought to have known this, and taken proper precautions in time to prevent collision.

In these findings the Judge of the Vice-Admiralty Court concurred, but on the 2nd of December, 1870, gave judgment, dismissing the Owners of the *Hibernian* from the suit, upon the ground, that the Master was bound to take a Pilot on board and place him in charge, in conformity with the requirements of the law, and the collision having been occasioned entirely by the fault of that Pilot, the Owners were entitled to exemption from liability.

The Appellants asserted an appeal from this Decree to Her Majesty in Council; but having failed to present a petition of appeal within six months, a petition was presented to the Queen in Council for special leave to prosecute the appeal, on the ground that the real Appellants were American subjects, and were unaware that the Statute, 26 Vict. c. 24, s. 23, limited the time of appealing from the Vice-Admiralty Court to six months, believing that a year and a day was the time limited for appealing; and on the 5th of

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February, 1872, an Order was made by the Queen in Council, granting leave to the Appellants to prosecute the appeal, which accordingly now came on for hearing.

Sir *John Karslake*, Q.C., and Mr. *H. M. Bompas*, for the Appellants:—

The general and maritime law of the High Court of Admiralty in *England* is the law that the Court of Admiralty in *Lower Canada* is bound to administer. The rights of suitors in the Vice-Admiralty Court of *Lower Canada* cannot be affected, or taken away, by a Canadian Statute. The suit might have been brought in the High Court of Admiralty, who would have disregarded the Canadian Statutes. This is a material consideration, and ought to conclude this case; *The Halley* (1); but the Judge of the Vice-Admiralty Court of *Lower Canada* has decided the case on the construction of the Canadian Statute, 27 & 28 Vict. c. 13. Section 14 of that Statute exempts the Owners of Vessels from liability for the acts of Pilots whom they are obliged compulsorily to take on Board; but if that Statute is applicable at all, it applies only to cases in which the particular Pilot is taken on board under the provisions of the Statute, and not, as in this case, where the Pilot may be, and was, selected by the Master of the Vessel, whose servant the Pilot becomes. The penalty provided by the Statute makes it optional in the Master to take a Pilot on board: *The Creole* (2); *The Lotus* (3); and the uniform selection of the same Pilot, which, it is proved in evidence, was the practice of the Master of the *Hibernian*, was not a compliance with the compulsory provisions of the Act, but only creates the relation of Master and Servant between the Master and the Pilot. The learned Judge in the Court below relied exclusively on *The Batavier* (4), which was a case of compulsory Pilotage, and it was held that, in such circumstances, the uniform employment of the same Pilot did not take away the exemption from liability under the *Pilot Act* (6 Geo. 4, c. 125, s. 55). In *The Christiana* (5) there was no option, as in this case, where the Master was at liberty either to take a

(1) Law Rep. 2 P. C. 193.
(2) 2 Wallace Jr., Rep. 485.
(3) 11 Low. Can. Rep. 342.
(4) 2 W. Rob. 407.
(5) 7 Moore's P. C. Cases, 160.

Pilot or pay the value of his services. In *Attorney-General* v. *Case* (1), the distinction between voluntary and compulsory Pilotage is very clearly exemplified, and upon the principles there stated, the Respondents, not being compelled by law to take a Pilot on board, were clearly liable : *Carruthers* v. *Sydebotham* (2) ; *The Maria* (3). Even where the Pilotage is compulsory by law, sect. 14 of the Canadian Statute, 27 & 28 Vict. c. 13, sect. 13, exempts the Master or Owner, when the damage is occasioned by the fault or incapacity of a qualified Pilot, which clearly shews that under that Act the Pilotage is to be deemed voluntary. All the American authorities are collected in the report of the case of *The China* (4), decided in the Supreme Court of the *United States*, and in which it was held, that though in the circumstance of that case the Pilotage was compulsory, nevertheless the Owners were not exempt from liability for the Pilot's mismanagement. The object of the Canadian Statutes is not to make Pilotage compulsory, as in *England*, for the purposes of navigation, but simply to encourage Pilots by creating a common fund from the dues given them for the benefit of the Pilots themselves. *The Peerless* (5), and *The Halley* (6), were cases of collision in Foreign waters, and the principal question in those cases was, what law was to prevail.

Mr. *C. Butt*, Q.C., and Mr. *E. C. Clarkson*, appeared for the Respondents.

THEIR LORDSHIPS intimated to the Respondents' Counsel that they would consider the case and the authorities referred to, before calling on them, and ultimately gave judgment without hearing them.

1872
Dec. 17.

Judgment was now delivered by

SIR ROBERT PHILLIMORE :—

This is an appeal from a Decree of the Judge of the Vice-Admiralty Court of *Lower Canada*, in a cause of damage brought

(1) 3 Price, 302.
(2) 4 M. & S. 77.
(3) 7 Wallace's Sup. Court (U. S.) Rep. pp. 53, 67.
(4) 1 W. Rob. 95.
(5) Lush. 30.
(6) Law Rep. 2 P. C. 193.

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by the Owner of a certain cargo laden on board of two Barges, against the Steamship *Hibernian*. The collision happened in the River *St. Lawrence* between *Pointe aux Trembles* and *Varennes*, off *Isle à l'Aigle*. The *Hibernian* was a large mail Steamer, proceeding with cargo and passengers down the *St. Lawrence*, on a voyage from *Montreal* to *Liverpool:* the Barges were proceeding up the River, in tow of a Steam-tug. The *Hibernian* ran into the Barges and sank them. The Court below found that the *Hibernian* was alone to blame for this collision, and the justice of this decision has not been controverted; but the Court below also found that the *Hibernian* was at the time of the collision under the charge of a Pilot, taken on board by compulsion of law; and that, therefore, her Owners were exempt from the liability which the Ship would otherwise have incurred. It is from this part of the decision that the appeal has been prosecuted. It is not disputed that a proper Pilot was on board; that he took charge of the Vessel; gave the orders for her navigation; that they were obeyed; and that the collision ensued in consequence.

It has been contended by the Appellants, nevertheless, that the *Hibernian* is not relieved from her liability. This contention is founded upon this position, that the general and maritime law is alone applicable to the case, by which law the wrongdoing Vessel is bound to make full compensation to the suffering Vessel for the damage inflicted upon her.

In order to sustain this position, it has been asserted—first, that the Canadian Statutes, presently to be mentioned, on which the learned Judge relied, are without authority in the Vice-Admiralty Court.

It has been said at the Bar that this suit might, and so far the statement is correct, have been instituted in the High Court of Admiralty, which it is also said would not have taken cognizance of the Statutes, and in support of this startling proposition the case of *The Halley* (1), decided by this Tribunal, was cited. Their Lordships are wholly unable to follow the reasoning of Counsel upon this point.

In the case of *The Halley*, the judgment turned upon a question as to the partial, or entire, adoption or rejection of the law of a

(1) Law Rep. 2 P. C. 193.

foreign Country. In the present case, the law invoked is contained in an Act of the Legislature of a Colony belonging to the Crown, and ratified by the express sanction of Her Majesty.

Their Lordships have no doubt whatever that this law, in every case to which it is applicable, is of binding authority, equally in the Queen's High Court of Admiralty and in the Vice-Admiralty Court of *Canada*, as a Court of appeal from which, it is to be observed, their Lordships are now sitting.

Secondly, it was argued that the Canadian Statute (27 & 28 Vict. c. 58) did not make the taking of a Pilot compulsory upon the *Hibernian*. The 10th section of that Statute is as follows:—"The Master or person in charge of each Vessel over one hundred and twenty-five tons, leaving the Port of *Montreal* for a Port out of this Province, shall take on board a branch Pilot from and above the Harbour of *Quebec*, to conduct such Vessel, under a penalty equal in amount to the Pilotage of such Vessel, which penalty shall go to the Decayed Pilot Fund."

It was contended that, by the language of this section, no compulsion is put upon the Master to take a Pilot, but that for not doing so merely a penalty is imposed. That, though the term "penalty" is used, it is only meant in the sense of an order to contribute to a particular fund—the support of which is a matter of public policy. But their Lordships are of a different opinion; they hold that when a Statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question; and that this principle is not affected by the fact that a penalty has a particular destination.

Various decisions in the Courts of the *United States* of *North America*, and especially one of very high authority in the Supreme Court, were cited for the purpose of shewing that such an order, with respect to taking a Pilot, as is contained in the section referred to, does not release the Ship from the liability, the *obligatio ex delicto*, which, by the general maritime law, attaches to the wrong-doer; and it certainly does appear that upon this point the decisions of the American Courts are at variance with the later decisions of the High Court of Admiralty, affirmed by the Judicial Committee of the Privy Council; this variance is certainly much to be regretted, but if it were necessary to decide the present case upon

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this point alone, their Lordships would think themselves bound to follow the precedents of the English Courts. It is to be observed, however, that no decision has yet been given by the American Courts upon the effect of a Statute releasing in express terms a wrongdoing Vessel from liability, upon the ground of compulsory pilotage. In the case of *The China*, decided by the Supreme Court, Mr. Justice *Swayne* observed: "The *New York* Statute creates a system of pilotage regulations. It does not attempt, in terms, to give immunity to a wrongdoing Vessel. Such a provision in a State law would present an important question, which, in this case, it is not necessary to consider (1).

The other Canadian Statute, to which reference must now be made, is 27 & 28 Vict. c. 13, intituled "An Act to amend the Law respecting the Navigation of Canadian Waters," in which Waters, it is to be borne in mind, this collision took place. By the 14th section it is enacted that "No Owner or Master of any Ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such Ship, within any place where the employment of such Pilot is compulsory by law."

Their Lordships entertain no doubt that these two Canadian Statutes are to be read and construed together as being *in pari materiâ*, and that the Owner of a Ship navigated in Canadian waters, under the directions of a Pilot taken on board in compliance with the provisions of these Statutes, employs the Pilot so taken on board by compulsion of law, and, therefore, except in circumstances of special exception, which it is not necessary to enumerate, is expressly exonerated, according to the law of *Lower Canada*, from all liability to compensation for damage inflicted upon another Vessel in consequence of obedience to such directions.

It remains only to notice the argument that the Pilot in this case was selected by the Master, and, therefore, that the relation of Master and servant subsisted between the Pilot and the Captain, representing the Owners. We think this argument is unsound. The 2nd section of the former Canadian Act enacts that "The Registrar of the said Trinity House at *Montreal* shall record in a register, to be kept by him for that purpose, the names and resi-

(1) 7 Wallace's Rep. Sup. Court (U. S.) Rep. p. 67.

dence in *Montreal* of all such branch Pilots as shall so report themselves, from amongst whom it shall be competent for all ship-masters and others requiring branch Pilots to select such Pilot or Pilots as they may think fit, other than those actually engaged to pilot the ocean mail Steamers, or any of them, and to indicate to the said Registrar the name or names of such Pilot or Pilots as they may select," &c.

It is plain that the epithet "such," here applied to Pilot, refers to the particular qualified class out of which the Master is obliged to select one person, and their Lordships are of opinion, that this restriction operates to destroy the relation of Master and servant which would arise in the case of a free choice made by the Master.

Their Lordships will humbly recommend Her Majesty to affirm the Decree of the Vice-Admiralty Court, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondents: *Gellatly, Son, & Warton.*

MALCOMSON . . . . . APPELLANT;

AND

THE GENERAL STEAM NAVIGATION COMPANY . . . . . } RESPONDENTS.

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Dec. 4, 5.

THE "RANGER" AND THE "COLOGNE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship and Shipping—Collision—Steering and Sailing Rules—Navigation of the River Thames.

It is the general practice for Steam Vessels going down the River *Thames* to keep on the north side. If, therefore, a Vessel rounding a bend on the north side, under a port helm, on her way up the River, sees the red light of one rounding

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* *Present*:—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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the same bend on her way down, over her starboard bow, and nearer the north side than she is herself, she is not justified in supposing that the Vessel coming down will cross her north, and pass her on her port side.

Vessels, under these circumstances, are not crossing Vessels within the meaning of the 14th article of the Steering and Sailing Rules.

The rule laid down in *The Velocity* (1) followed.

THIS was an appeal and cross appeal from a Decree of the High Court of Admiralty pronounced in a cause of damage instituted by the *General Steam Navigation Company*, the Owners of the Steam-vessel *Cologne*, against the Steam-vessel *Ranger*, her tackle, apparel, and furniture, and against the Owners of the *Ranger* intervening.

The *Cologne* was a paddle-wheel Steam-vessel of 324 tons register, and the *Ranger* was a screw Steam-vessel of 308 tons register. The collision took place in *Greenwich Reach*, in the River *Thames*, on the 5th of January, 1871, a little before midnight. The *Cologne* was steaming down and the *Ranger* was steaming up the river.

The case set up on behalf of the *Cologne* was, that she was rounding the *Isle of Dogs* under a starboard helm and keeping over to the north side of the river, but, as the Witnesses for her stated, being a little north of mid-channel, when the *Ranger*, with her green light open, was seen at a distance of about from one-half to three-quarters of a mile from the *Cologne*, and slightly on her starboard bow. The *Cologne* alleged, that the *Ranger* was considerably further over to the south side of the river than the *Cologne*, and that the *Cologne* was kept under a starboard helm, but the *Ranger*, instead of passing to the southward of the *Cologne*, improperly ported her helm, and so caused the collision.

The case of the *Ranger* was, that she was proceeding up *Greenwich Reach* upon the north shore when the *Cologne* was seen a little on the starboard bow of the *Ranger*, at a distance of about three-quarters of a mile, exhibiting her masthead and port lights only to those on board the *Ranger*, and that the *Cologne* was proceeding in a direction to pass the *Ranger* upon her port side. The *Ranger* was kept on her course along the north shore, and the *Cologne* kept on as if intending to pass the *Ranger* upon her port

(1) Law Rep. 3 P. C. 44.

side until she had neared the *Ranger*, and then suddenly altered her course under a starboard helm, and so caused the collision.

At the hearing, the evidence, as the Appellants contended, failed to support the case of the *Cologne*, and fully supported the case put forward on behalf of the *Ranger;* but the Judge of the Court below (The Right Hon. Sir *Robert Phillimore*) found that both Vessels were to blame for the collision, and pronounced accordingly. The Court was assisted by two of the Elder Brethren of the *Trinity House*, who differed in opinion, and one of them did not concur in the judgment.

Both parties appealed from this judgment.

Mr. *Milward*, Q.C., and Mr. *Gainsford Bruce*, for the Owners of *The Ranger*, referred to *The Velocity* (1), and *The Esk and Niord* (2).

Mr. *Butt*, Q.C., and Mr. *E. C. Clarkson*, for the Owners of the *Cologne*, cited, in respect to the pleadings, the rule, *secundum allegata et probata*, as laid down in *The Alice and The Rosita* (3); *The East Lothian* (4).

Their Lordships' judgment was pronounced by

SIR BARNES PEACOCK:—

This was a suit for collision between two Steam-vessels; the Steamer *Cologne*, a Vessel of 324 tons register and 120 horse-power, was one, and the other was the screw Steamship *Ranger*, of 308 tons register and 40 horse-power. Each of the Vessels complains of the other. Each says that the other was in fault, and each states that the other ran against her. The *Ranger* says that the *Cologne* ran with her starboard paddle-box against her stem.

It appears that the *Cologne* was going down the River, and the *Ranger* was coming up. The accident happened on the 5th of January, 1871, between half-past eleven and twelve o'clock. It was a fine night and moonlight. The tide was running up about the last quarter flood at the rate of about two knots an hour. It seems that the waterway in that part of the River was about 900 feet, and that the collision took place about 150 feet from the north

(1) Law Rep. 3 P. C. 44.
(2) Ibid. 436.
(3) Law Rep. 2 P. C. 214.
(4) 14 Moore's P. C. Cases, 173.

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shore at a short distance from a Barge called the "Dumb Barge." The question to be considered is, whether both the Vessels were in fault, and if not, whether either, and which of them, was in fault.

The learned Judge of the Admiralty Court found that they were both in fault, and divided the damages. Each of the Vessels was a suitor in the Admiralty Court, each complains of the decision, and each appeals to this Court. The *Cologne*, by adhering to the appeal of the *Ranger*, is substantially appealing. The learned Judge says:—"The *Cologne* was proceeding down the River *Thames*, and the *Ranger* was proceeding up the River, and, in my judgment, there is no question of practice or usage as to the navigation of one side of the River or the other, which can govern or affect this question; nor is there any rule of the Regulations for preventing collision applicable to this case. I am bound to say, that the Elder Brethren of the *Trinity House* do not themselves agree with each other as to the Vessel which was to blame in this case. The opinion, therefore, I am about to deliver is the opinion of one of the Elder Brethren and myself; and I think it fair to make that statement to Counsel. I will read the language of the Elder Brother, whose opinion I am inclined to assent to, and I will read the words we have agreed to use." The words are these:—"These Vessels were rounding the point between *Greenwich* and *Limehouse Reaches* in opposite directions, the one under a starboard helm and the other under a port helm, and rapidly altering their respective bearings from each other. They seem to have been both navigating on the north shore, and at about the same distance from the shore. The Vessel coming down, the *Cologne*, would see the other Vessel's green light, and might be induced to conclude that she intended to pass on her starboard side, and the *Cologne* would consequently keep on under her starboard helm. As the Vessels were approaching each other at the rate of about thirteen knots, and only three minutes had elapsed from their first sighting each other, there was no time for the *Cologne* to have done anything to avoid a collision after seeing the *Ranger's* light had changed from green to red. The Vessel coming up, the *Ranger*, would see the other Vessel's red light, and might also suppose that she intended to pass on her port side, and would, therefore, keep under a port helm. When the *Cologne's*

light changed from red to green" (it is not stated at what time that change took place), "which it would naturally do, there was no time or room for clearing each other, even by the *Ranger* putting her helm hard aport, which was done;" and then the learned Judge says, "In these circumstances it seems most probable that both Vessels were to blame for the collision."

Now, let us consider, was the *Cologne* to blame according to this finding? The learned Judge says, "The Vessel coming down, the *Cologne*, would see the other Vessel's green light, and might be induced to conclude that she intended to pass on her starboard side, and the *Cologne* would subsequently keep on under her starboard helm." It appears to their Lordships that the *Cologne* was not guilty of any negligence in so acting upon that conclusion.

Then, was there any fault or negligence on the part of the *Ranger*? The learned Judge says, "The Vessel coming up, the *Ranger*, would see the other Vessel's red light, and might also suppose that she intended to pass on her port side, and would, therefore, keep under a port helm." Now, when the *Ranger* saw the *Cologne's* red light she saw it two points over her starboard bow, and, therefore, the *Cologne* must have been nearer to the north side at that time than the *Ranger*. If the *Cologne* was nearer to the north side than the *Ranger* at that time, the *Ranger*, if she thought that the *Cologne* would pass her on her port side, must have supposed that the *Cologne* would cross her path. Was she right in that supposition? It is stated that there is a practice for Vessels going down to keep on the north side. If the *Cologne* had gone much to the south side she would have got where the tide against her was the strongest. There was no good reason, therefore, for the *Ranger's* supposing that the *Cologne* would cross her path and pass on her port side. On the other hand, the *Cologne* saw the *Ranger's* green light, and she might naturally suppose that, looking to the practice of navigating that part of the river by Vessels going down, the *Ranger* would pass her upon her starboard side, giving green light to green light.

In the case of *The Velocity* (1), which has been referred to, it was held that Vessels meeting under circumstances like these did not fall within the 14th rule of the Regulations for preventing col-

(1) Law Rep. 3 P. C. 44.

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lisions. That rule is, "If two Ships under steam are crossing so as to involve risk of collision, the Ship which has the other on her own starboard side shall keep out of the way." If the two Vessels were within that rule, the *Ranger*, seeing the red light of the *Cologne* on her starboard side, was the one to keep out of the way. In the case of *The Velocity* (1) it was held, that Vessels under similar circumstances were not crossing Vessels within the meaning of the 14th rule. But the very circumstances which prevent the Vessels from being deemed crossing Vessels within the meaning of the rule ought to have led the *Ranger* to suppose that the *Cologne* was not about to cross from her starboard side, and to pass her on her port side. Lord *Chelmsford* in delivering their Lordships' judgment in the case of *The Velocity* (1), referring to the remarks of the Judge of the Admiralty Court in that case, said (2), "The learned Judge in delivering his judgment says,—'We' (that is, himself and the Elder Brethren of the Trinity House by whom he was assisted) 'think that the evidence establishes that the *Carbon* saw the masthead and port light of the *Velocity* alone.'" The case of the *Carbon* there is like the present case of the *Ranger*. "'The Vessels were, therefore, crossing under the rule to which I have referred,' the 14th, 'and it was, therefore, the duty of the *Carbon* to get out of the way of the *Velocity*. The course which the *Carbon* adopted was to port, and the Elder Brethren think that this was the only mode of getting out of the way in the circumstances.' But," said Lord *Chelmsford*, "the fact of the *Carbon* having seen the port light of the *Velocity* does not necessarily prove that the *Velocity* was crossing the river, as the learned Judge and his Assessors seem to have thought. The relative position of the two Vessels when they first came in sight of each other must not alone be regarded, but also the bend of the River in the part where the collision took place. A Vessel rounding the curve of the north shore would necessarily, during some part of her course, have her head slightly inclined towards the south shore, so as to exhibit her port light to a Vessel in mid-channel coming in a contrary direction, and in fact the *Velocity* was not crossing or intending to cross the River when she was seen by the *Carbon*, but was pursuing the regular course along the north shore, keeping as near to that shore as it was convenient

(1) Law Rep. 3 P. C. 44. (2) Law Rep. 3 P. C. 49.

under a starboard helm." The *Velocity* in that case was very much in the position of the *Cologne* in the present case. His Lordship proceeded: "The Appellant alleged that this was the well-known customary track for Vessels going down the River; and to establish their case in this respect they called Captain *James*, the principal Harbour-master of the River, who said, 'It is the custom that Vessels going down, whatever be their tonnage or their cargo, and whether at flood or ebb tide, invariably keep on the north side, and Vessels coming up invariably keep on the south side." Then he referred to the statement of the Quartermaster of the *Dreadnought* (1), who gave similar evidence and said: "That there has been a practice for Vessels going down the River to prefer the north to the south side is proved by the above evidence; but that there was any custom of this kind in the strict sense of the word, to which all Vessels would be bound to conform, is certainly not the fact." In another part (2), he says, "But, putting the Regulations aside, their Lordships are at a loss to discover what possible blame can be imputed to the *Velocity*. She had a perfect right to be where she was, and she was pursuing a usual course of navigation down the River, from which she never deviated until forced to do so by the peril of a collision, into which she was brought by the sudden change of course of the *Carbon*. On the other hand, the *Carbon* appears to their Lordships to be wholly to blame. She knew, or ought to have known, that a Vessel coming down the River had a right to run down on the north shore; and in the position in which she was, the appearances to her of the red light of a Vessel on that side of the mid-channel was no indication that the Vessel was in the act of crossing the River; and yet, there being nothing else to justify the belief, she acts at once upon her hasty and erroneous conclusion, and so occasions the collision."

Now, the *Ranger*, seeing the red light of the *Cologne* on her starboard bow, ported her helm and endeavoured to pass the *Cologne* on her port side, between her and the north side of the River. Was she right in doing that? If, as in the case of the *Velocity*, she ought not to have supposed that the *Cologne* was crossing, she ought to have kept to the south of the *Cologne*, and

(1) Law Rep. 3 P. C. 50. (2) Law Rep. 3 P. C. 51.

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then the accident would not have occurred. But instead of that she endeavoured to pass the *Cologne* on her port side, and brought herself into that position in which the danger of a collision became imminent. It appears to their Lordships, that the *Ranger* was wrong in porting and endeavouring to pass on the larboard side of the *Cologne*. Their Lordships think, that the *Ranger* was going up the River to the north of the mid-channel where she would get the tide, but that when the Vessels first sighted each other she was not so near to the north side of the river as the *Cologne*. It is clear, that when the Vessels first sighted, a collision was not inevitable. They were at least half a mile (some of the Witnesses say three-quarters of a mile) distant from each other at that time; and according to the rate at which the two Vessels were approaching each other, taking the velocity of each, it took about two minutes and a half, or three minutes, before the Vessels could reach each other. There was, therefore, ample time, and there was ample room in the River, for each to have kept clear of the other. There was no danger of a collision if the Vessels had adopted a proper course when they first saw each other. No doubt the danger became imminent at last, but that was in consequence of the Vessels being in a wrong position: and it appears to their Lordships that the danger arose from the *Ranger's* adopting a course which she ought not to have adopted.

Then, again, did the *Ranger* act properly when the collision became imminent? Could she have done anything to avoid it? Was she right in porting her helm? From the evidence it appears, that the Master is asked— "Then what did she do?—*A.* Altered her helm." This is speaking of the *Cologne.* "*Q.* Which way?—*A.* To starboard, and I saw his green light, and I said to our Pilot, 'Good God, he has got his helm to starboard.' *Q.* Which way was she going then, or trying to go then?—*A.* Trying to come to the northward of us when she starboarded. *Q.* You say she opened her green light; what became of her red?—*A.* Shut it in, and we lost sight of it. *Q.* Well, now, if she had kept on her course?—*A.* The collision would not have occurred. *Q.* If she had not starboarded?—*A.* If she had not starboarded. The Court: You ascribe the collision in fact to her starboarding?—The Witness: Entirely. What did you do with your engines?

—*A.* Helm to be put hard-a-port, and stopped and reversed the engines. *Q.* When did you do that?—*A.* As soon as we found the *Cologne* had starboarded." Well, now the Pilot says, that in putting the helm hard to port he did not mean that the Vessel should act as in the ordinary case of a helm being put hard to port, because he reversed the engines, and when he put the helm hard to port he meant it, by reversing the engines, to have the effect of starboarding. But it did not have that effect, because the way upon the Vessel had not been taken off by reversing the engines, and it was proved that the *Ranger* altered her course two or three points to starboard under the port helm. If she had not altered her course under a port helm, in all probability she would have gone clear of the *Cologne;* so that the accident appears to have been caused by the fault of the *Ranger*, first in endeavouring to pass the *Cologne* on her port side, and secondly in putting her helm hard-a-port, when the Vessels were almost in a state of collision. The 13th rule was not then applicable to the Vessels; as held in the case of *The Velocity* before referred to. It may be, as remarked by the learned Judge, that when the *Cologne's* light changed from red to green, there was no time for clearing each other. But it was by the fault of the *Ranger* that the Vessels were in that position.

Their Lordships, therefore, think that the accident was not caused by the fault of both, but solely from the fault of the *Ranger.*

But it has been said that the *Cologne* is not entitled to recover against the *Ranger*, inasmuch as she must recover according to the allegation in her petition. Now, in the petition she says, that "the *Ranger* was considerably further over to the south side of the said River than the *Cologne.*" The word "considerably" is not necessarily to be proved to the full extent. When the Vessels first came in sight the *Ranger* was further over to the south side of the River than the *Cologne;* the Master of the *Ranger* proved, that he saw the *Cologne's* red light two points to his starboard bow. He certainly did say the port bow in the first instance, but he corrected himself afterwards, and it is not necessary now to inquire, whether his first statement was made by mistake or not. The fact is, that he saw her over the starboard bow. Then the

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Ranger was further over to the south side of the River than the *Cologne*. The allegation proceeds: "The *Cologne* was kept under a starboard helm along the north shore, and the *Ranger*, with her green and masthead lights only open, appeared for some time to be intending to pass to the southward of and on the starboard side of the *Cologne*, as she could and ought to have done; but, instead of so passing the *Cologne*, the *Ranger* improperly ported her helm, and caused immediate danger of collision; and although the helm of the *Cologne* was thereupon put hard starboard, and her engines were ordered to be stopped and reversed, the *Ranger* with her stem struck the *Cologne* on her starboard paddle-box and side-house, and did her a great deal of damage." Their Lordships think, that the case really comes within this allegation, that the *Ranger* was more to the south than the *Cologne*, and that the damage arose from her porting her helm and attempting to pass the *Cologne* on her port side.

Under these circumstances, their Lordships think, that the decision of the Court below ought to be reversed. They find that there was no fault on the part of the *Cologne*, and that the *Ranger* was wholly to blame; and they think it right to say, that the Sailing Masters, of whose experience and assistance their Lordships have had the benefit, both concur in that opinion.

Their Lordships will, therefore, humbly advise Her Majesty that the decree be reversed, and that the *Ranger* be condemned in all the damages done to the *Cologne*, with the costs of the Court below and also in the costs of this appeal.

Solicitor for the Appellants: *Thomas Cooper.*
Solicitors for the Respondents: *Cattarns & Co.*

HENRY THOMAS MORTON, AND OTHERS, THE OWNERS OF THE STEAMSHIP "FRANKLAND" . . . . . } APPELLANTS;

AND

WILLIAM HENRY HEAP HUTCHINSON, AND OTHERS, THE OWNERS, MASTER, AND CREW OF THE STEAMSHIP "KESTREL." . . } RESPONDENTS.

J. C.*
1872
Dec. 6.

THE "FRANKLAND" AND THE "KESTREL."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship and Shipping—Collision—Art. 16 *of Rules and Regulations for preventing collisions by Steamships.*

Art. 16 of the Rules and Regulations for preventing collisions at Sea provides, that "Every Steamship, when approaching another Ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every Steamship shall in a Fog go at a moderate speed." A Steamship navigating in a Fog at a moderate speed hearing a whistle sounded many times, indicating that a Steamer was approaching her, and had come very near to her, so near that if the Vessels had then been stopped they would have been within hailing distance, is bound under the 16th Article not only to stop the motion of her Engines, but to reverse them, so as to stop the motion of the Vessel, and ought not to wait until the Vessels sight each other, when such a manœuvre may be too late.

IN this case the appeal was brought from a decree of the High Court of Admiralty in cross causes of damage in suits respectively brought by the Respondents, as the Owners, Master, and crew of the late Steamship *Kestrel*, against the Steamship *Frankland*, of which the Appellants were Owners, and by the Appellants as Owners of the *Frankland* against the Respondents as Owners of the *Kestrel*, for the recovery of damages in respect of losses severally sustained by reason of a collision between the two Steamships.

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

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The collision in question happened at about 9.30 P.M. on the 23rd of April, 1871, off the *Norfolk* coast, and the *Kestrel* shortly afterwards sank and was lost.

The *Kestrel* was an iron screw Steamer, of 392 tons registered tonnage, proceeding from *Rotterdam* to *Hull*, with a general cargo and passengers. The *Frankland* was a screw Steamer, of 541 tons register, proceeding from *Sunderland* to *London* with a cargo of Coals.

The case on the part of the *Frankland* was, that there was a dense Fog, and that she was being steered S.S.E., and making under two knots an hour; that her steam whistle was being sounded at intervals; that her proper lights were burning brightly, and a good look-out being kept; that the steam whistle of another Steam Vessel was heard, apparently on the starboard bow; that the Engines of the *Frankland* were thereupon stopped, and her steam whistle sounded: that in a short time the masthead light, and, immediately afterwards, the red light of the *Kestrel* became visible at the distance of about a Ship's length, and about a point on the starboard bow; that thereupon the Engines of the *Frankland* were reversed, but notwithstanding, the *Kestrel* approached at considerable speed, and with her port bow came into collision with the stem of the *Frankland*, and the Owners of the *Frankland* charged those on board the *Kestrel* with having been in fault for having improperly ported the helm of the *Kestrel*, and having failed to comply with the provisions of Article 16 of the Rules and Regulations for preventing collisions at Sea.

On the part of the *Kestrel* it was alleged, that she was steering N.N.W.; that two steam whistles were heard, one on the port bow, and one right ahead; that the helm of the *Kestrel* was thereupon ported until her head was about N., when the helm was steadied; that she so continued for a short time, when the green and white lights of the *Frankland* became visible on the *Kestrel's* port bow, distant about two Ships' length; that the *Kestrel's* engines were at once reversed, and the *Frankland* hailed to port her helm, but that the collision took place. The Owners of the *Kestrel* did not by their petition charge the Owners of the *Frankland* with any specific act of negligence.

The suits were heard on oral evidence before the Judge of the

Court below (The Right Hon. Sir *Robert Phillimore*), assisted by two of the Elder Brethren of the Trinity Corporation, who pronounced both Vessels to have been in fault on the ground, that each ought to have reversed her engines immediately upon hearing the whistle of the other, and accordingly decreed for a moiety of the damages proceeded for, but made no order as to costs.

The Appellants, the Owners of the *Frankland*, appealed from this decree. The Owners of the *Kestrel*, the Respondents, did not adhere to the appeal, but relied on their case lodged in reply to the appeal.

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants, the Owners of the *Frankland*:—

It was proved by the evidence, that the two Steamers were steering exactly opposite courses, and that the *Kestrel* was on the starboard bow of the *Frankland*, and that there would not have been a collision if the *Kestrel* had not ported her helm. The *Kestrel* was going at too great a speed, and acted improperly by porting her helm before she had ascertained the position and bearing of the *Frankland*. And those on board the *Kestrel* improperly neglected to stop her engines upon being warned by hearing the *Frankland's* whistle of the proximity of another Steamer; while those on board the *Frankland* stopped her engines as soon as they heard the whistle, and immediately upon seeing the lights of the *Kestrel* reversed her engines, and thereby complied with the provisions of Article 16 of the Rules and Regulations for preventing collisions at Sea; that the evidence proved, that the collision was occasioned by the improper navigation of the *Kestrel*, and not in any way by any improper navigation on the part of the *Frankland*. They cited *The Jesmond and The Earl of Elgin* (1).

Mr. *Butt*, Q.C., and Mr. *Pritchard*, for the Respondents, the Owners of the *Kestrel*:—

Insisted, that from the violence and direction of the blow, and from the other facts proved by the evidence in the cause, it was evident, that the *Frankland* was proceeding at an undue speed at the time when the *Kestrel's* whistle was heard. That when the

(1) Law Rep. 4 P. C. 1.

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Kestrel's whistle was heard the engines of the *Frankland* ought to have been immediately reversed, which had not been done.

Judgment was delivered by

SIR ROBERT P. COLLIER :—

This is a case of collision between two Steamers, the *Kestrel* and the *Frankland*, somewhere off the coast of *Norfolk*. The judgment of the Admiralty Court found that both Vessels were to blame. From this judgment the *Frankland* appeals, but the *Kestrel* has not adhered to the appeal.

The main facts—which appear not to be in dispute—are these: The *Kestrel* was steering about N.N.W., the *Frankland* in a precisely opposite direction, S.S.E. The weather was calm, there being scarcely any wind. There was a dense Fog, and the tide was flowing southward about two knots an hour.

It has been contended, that the judgment of the Court below is vitiated by an erroneous finding on a question of fact as to the speed at which the *Kestrel* was going, and on the other side it has been said that the Court was wrong in estimating the speed of the *Frankland*. Their Lordships, after carefully considering the evidence, are of opinion that, whatever opinion they might have been disposed to form as a Court of first instance, there was sufficient evidence in the case upon which the Judge of the Court of Admiralty, who had the advantage, which their Lordships have not, of hearing the Witnesses, might reasonably find as he has done; namely, that the speed of both Vessels was from two to two and a half knots through the water.

It has been, indeed, suggested that the learned Judge left out of consideration a difference, well known to nautical persons, between the rate of a Vessel going through the water and the rate of that Vessel going over what is called the ground; but their Lordships see no reason to suppose that the learned Judge can have overlooked a distinction which appears so clear and obvious.

The finding of the Court upon the question of negligence is in these terms: "Both Vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other; and in such a state of circumstances I have had to ask myself this

question,—Could anything have been done to avoid this collision which was not done? And the opinion of the Court, fortified by that of its Nautical Assessors, is, that upon hearing the whistles of each other so near and approaching each other, each Vessel ought not only to have stopped but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other Vessel was, and which way she was proceeding, and by that means the collision would or might have been avoided. And this being the opinion of the Court, it will enforce the application of Article 16 of the Rules and Regulations for preventing collisions at Sea, which it is always the object of this Court to see carried into due and proper execution, for the due and proper execution of that Rule would tend very much to prevent both loss of life and property, of which there are so many melancholy instances every week in this Court." Their Lordships entirely concur with the learned Judge of the Court of Admiralty as to the importance of enforcing this Rule. The rule is: "Every Steamship, when approaching another Ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every Steamship shall, in a Fog, go at a moderate speed." As far as the latter part of the Rule is concerned, both Vessels would appear to have obeyed it. The question is as to the application of the first part of the Rule.

The *Kestrel* not having adhered to the appeal must be assumed to have been in fault; and their Lordships do not think it necessary to determine the precise extent to which she was in fault. It has, indeed, been argued that part of her fault was in porting her helm. Their Lordships do not think it necessary to decide, whether or not she was in fault in so doing, but the inclination of their opinion is, that the porting of her helm under such circumstances cannot be properly considered as negligence on her part.

The only question in the cause is, whether or not there is sufficient evidence to justify the finding of the Court of Admiralty that there was negligence on the part of the *Frankland* materially contributing to the accident?

It has been argued, that the effect of the decision is, that every Steamship in a Fog hearing the whistle of another Steamship

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approaching her, ought immediately, without reference to the distance at which the Ships may appear to be from each other, or to any other circumstances, to reverse her engines. But their Lordships do not understand the Court of Admiralty to have laid down any such general proposition. They understand the finding to have been confined to the circumstances of the case, and those circumstances they understand, in the opinion of the Court, to have been these, as far as the *Frankland* is concerned: That she was navigating in a Fog at a moderate speed, that she heard a whistle sounded many times, indicating that a Steamer was approaching her and had come very near to her—so near indeed that if the Vessels had then stopped they would have been within hailing distance—that at that point of time it was necessary for the Captain of the *Frankland*, under the terms of the Rule, not only to stop the motion of the engines but to reverse them, so as to stop the motion of his Vessel, and that he ought not to have waited until the Vessels sighted each other, when such a manœuvre would have been too late.

That being the view which their Lordships take of the decision of the Court of Admiralty, they are of opinion that it is right; and for these reasons they will humbly advise Her Majesty that that judgment be affirmed, and this appeal dismissed, with costs.

Solicitor for the Appellants: *Thomas Cooper.*

Solicitors for the Respondents: *Pritchard & Sons.*

In re BLAKE'S PATENT.

J. C.*
1873
Jan. 14.

Letters Patent—Statute, 15 & 16 *Vict. c.* 83, *s.* 25—*Foreign Patent expired—Application for extension of English Patent—Jurisdiction—Public policy.*

A Patent was first taken out in *America*, afterwards in *England*, and two days after the date of the English Patent the invention was patented in *France*. The French Patent was allowed to drop. On an application for prolongation of the English Patent, *Held*—following *Winan's Patent* (1)—that, although the Judicial Committee might have jurisdiction under the 25th section of the 15 & 16 Vict. c. 83, to entertain the application, yet, on the ground of public policy, as the French Patent had been allowed to expire, they would not in the exercise of the discretion vested in them, recommend the extension of the term of the English Patent.

THE Petitioners, Assignees of the Patent, applied for an extension of the term of Letters Patent granted to *Lyman Reed Blake*, of the State of *Massachusetts*, in the *United States of America*, for an invention of "a new and useful, or improved, machine for sewing a sole to a Boot or Shoe," and were "*The Blake Sole Sewing Machine Company, Limited*," having business premises in *London*.

The following facts appeared from the petition:—The Patentee, obtained on the 6th of July, 1858, a Patent in *America* for the above invention. Afterwards, on the 3rd of May, 1859, he took out a Patent in *England* for the same invention, and on the 5th of May in the same year he obtained Letters Patent, or *brêvet d'invention*, in the Empire of *France* in respect of the same invention. Patents for the invention were also taken out in other Countries in the year 1864, which were still subsisting. In 1860, a partnership for working the invention in *England* and *Wales* was formed by certain persons, whose interests were afterwards, in 1862, assigned to the Petitioners. It further appeared from the petition, that the French Patent had expired in 1862, by reason of the non-payment of certain annuities, or annual duties, imposed upon Patentees by the French Law.

Sir *John Karslake*, Q.C. (with whom were Mr. *Aston*, Q.C., and Mr. *E. Carpmael*), for the Petitioners:—

It is useless to enter upon the merits of the case, if the Court

* *Present*:—Sir James William Colvile, Sir Barnes Peacock, Sir Montague Edward Smith, and Sir Robert Porrett Collier.

(1) *Ante*, p. 93.

J. C. 1873 *In re* Blake's Patent.

should be of opinion, that the decision in *Winan's Patent* (1) is conclusive. In that case, upon the construction of sect. 25 of 15 & 16 Vict. c. 83, it was held, that this Tribunal would not, on the ground of general policy, recommend the renewal of an English Patent, after a French Patent for the same invention had been allowed to expire. That decision was considered to be in conformity with the principles which the Judicial Committee proceeded on in *Bett's Patent* (2), *Newton's Patent* (3), *Hill's Patent* (4), *Normand's Patent* (5), *Pitman's Patent* (6), and in *Poole's Patent* (7), but none of these cases, it is submitted, are decisive with respect to the present case, or go as far as the later case of *Winan's Patent* (1). There does not seem to be any sufficient reason on the ground of public policy, for depriving a Patentee of the right of prolongation of a Patent taken out in this Country, because a Patent for the same invention has been taken out in a Foreign Country and has expired before the English Patent.

The *Attorney-General* (Sir *John Coleridge*), and Mr. *Bowen*, for the Crown:—

No jurisdiction exists in this Tribunal to entertain the petition. The 25th section of the Statute, 15 & 16 Vict. c. 83, in the circumstances of the French Patent having expired, excludes the jurisdiction conferred on this Tribunal by the former Patent Acts. *Winan's Patent* (1) conclusively settled the question, if any doubt existed. The same construction was put on that section by Lord *Hatherley* in *Daw* v. *Eley* (8).

Mr. *Holker*, Q.C., and Mr. *Macrory*, for the Opponent, *Sheppard*:—

The grant of an extended term is not of right, but an act of favour. On the ground of public policy, as the French Patent has been allowed to drop, the invention is open to the public in *France*, which places the English manufacturer in a most unfavourable position; the decision in *Winan's Patent* (1) is conclusive.

(1) *Ante*, p. 93.
(2) 1 Moore's P. C. Cases (N.S.) 49.
(3) 15 Moore's P. C. Cases 176.
(4) 1 Moore's P. C. Cases (N.S.) 263.
(5) Law Rep. 3 P. C. 193.
(6) *Ante*, p. 84.
(7) Law Rep. 1 P. C. 514.
(8) Law Rep. 3 Eq. 496, 510.

9 Jur. N.S. 1209

SIR BARNES PEACOCK:—

In this case, their Lordships cannot say that they have no jurisdiction. The word "such" in the proviso in the 25th section of the Statute, 15 & 16 Vict. c. 83, has already received a judicial construction, the word "such" being held to apply to a Patent taken out in a Foreign Country before the grant of Letters Patent in *England*: *In re Betts' Patent* (1). Their Lordships, therefore, think the meaning is, that where a Patent is taken out in a Foreign Country, before the grant of Letters Patent in *England* and the Foreign Patent has expired, then that the Patent in *England* should cease to be in force, and that where one "such" Patent, or the old Patent, has been obtained abroad, then the English Patent shall be determined at the expiration of the earliest of the Letters Patent granted in a Foreign Country.

Therefore, notwithstanding that their Lordships may have jurisdiction in such a case, it is a question to be determined on grounds of public policy, whether they ought to advise Her Majesty to grant a prolongation of such a Patent as this. In *Hill's Patent* (2), in 1863, Sir *John T. Coleridge* says: "Whether that term shall be extended, in effect, whether a second Patent shall be granted for the same consideration, and the enjoyment by the public of its vested right be postponed, is to depend on the exercise of a discretion, judicial indeed, yet to be influenced by every such circumstance as would properly weigh on a sensible and considerate person in determining, whether an extraordinary privilege, not of strict right, but rather of equitable reward, should be conferred."

In *Newton's Patent* (3), referred to in *Winan's Patent* (4), their Lordships thought that they ought not, in the exercise of a sound judicial discretion, to advise Her Majesty to grant a prolongation of the Patent. The same principle was adopted in *Johnson's Patent* (*Wilcox & Gibbs* Sewing machine) (5) in 1872, and was finally upheld, after consideration of all the authorities, in *Winan's Patent* (4).

If the Patent in *France* had been taken out on the 3rd of May,

(1) 1 Moore's P. C. Cases (N.S.) 49.
(2) 2 Moore's P. C. Cases (N.S.) 264.
(3) 15 Moore's P. C. Cases, 176.
(4) *Ante*, p. 93.
(5) *Ante*, p. 96.

(2) 1 C. P. Cas. N.S. 210

J. C. 1873 *In re* BLAKE'S PATENT.

1859, instead of the 5th of May, in that year, it is clear, that under the Statute, 15 & 16 Vict. c. 83, s. 25, their Lordships would have had no power to recommend a prolongation of the Patent. Then, would their Lordships be carrying out the policy of the Legislature if they were to advise Her Majesty to prolong this English Patent, which was granted on the 3rd of May, 1859, merely because the French Patent was granted two days afterwards, when they would have had no jurisdiction to advise Her Majesty to prolong the Patent at all if the French Patent had been taken out a day earlier than the English Patent. Their Lordships think, that they would be flying in the face of the policy laid down by the Legislature under the Statute, 15 & 16 Vict. c. 83, if they were to recommend Her Majesty to prolong the term of the Letters Patent in this case. It has been stated in argument, that there is not much difference between allowing a Foreign Patent to expire and not taking out a Foreign Patent at all. There is this difference, that where a Patentee takes out a Patent for a Foreign Invention, he is taking active measures to make the invention known in the Country in which he takes out such Patent; and the Legislature has not said that no Patent shall be granted in *England* for a Foreign Invention, unless the Inventor shall have taken out a Patent in some other Country. If they had so provided, it would, in effect, be prohibiting altogether the grant of a Patent for a Foreign Invention. The Legislature has not declared such to be their policy upon that subject, but they have declared that, where a Foreign Inventor has taken out a Patent in *England* for such invention, and has also taken out a Patent in a Foreign Country, and has allowed such Foreign Patent to expire, then, as Lord *Hatherley* states in the case of *Daw* v. *Eley* (1), it is apparent that the object of the Legislature was to "prevent the English manufacturer from being fettered while the Foreigner remains free."

Their Lordships, therefore, looking at the whole of the case, and especially to *Winan's Patent* (2), think that they ought not to advise Her Majesty to grant a prolongation of this Patent.

Solicitors for the Petitioners: *Wilson, Bristows, & Carpmael.*
Solicitors for the Opponent: *Vizard, Crowder, & Co.*
Solicitors to the Treasury, for the Crown.

(1) Law Rep. 3 Eq. 510. (2) *Ante*, p. 93.

In re CARR'S PATENT.

J. C.*
1873
Jan. 14.

Letters Patent—Profits—Allowance to Patentee for loss of time in bringing Patent into public use—Prolongation.

In circumstances shewing a want of adequate remuneration, an extension of the term of Letters Patent granted for six years.

In estimating the profits derived from the Patent, the Judicial Committee will take into consideration a deduction from the profits of the Patent for the personal expenses of the Patentee for the exclusive devotion of his time in bringing the Patent into practical operation and public notice.

THE Petitioner in this case, was the Patentee of an invention for "improvements in machinery for disintegrating artificial manures."

The invention consisted of a series of cylindrical cages, arranged on an axle concentrically, and capable of revolving in different directions, and with varying velocities; into the central of the revolving cages of which the material to be operated on was introduced, and by centrifugal force thrown against the bars of each cage in succession, and finally delivered from the circumference of the outer cages in the requisite state of disintegration, or pulverisation; having been subjected, in its passage from the centre to the circumference, to violent blows from the bars forming each cage.

In the petition it was alleged, that the invention comprised in the Letters Patent was his sole invention, and was made by him at considerable expense, and after long and laborious personal efforts and application; that the invention was of very great utility, and highly beneficial to the public. That immediately after obtaining, on the 29th of March, 1859, provisional protection for his invention, the Petitioner, by circulars addressed to artificial manure manufacturers, and by public advertisements in Newspapers published in different parts of the *United Kingdom*, and by other personal exertions, endeavoured, to the best of his ability, to make known his invention, and to induce the public to purchase

* *Present:*—Sir James William Colvile, Sir Barnes Peacock, Sir Montague Edward Smith, and Sir Robert Porrett Collier.

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and use the same. That as the invention was useful for other substances besides artificial manure, circulars were issued by him, not only to artificial manure manufacturers, but to all Firms likely to require the machinery. That machines were, from time to time, publicly exhibited at Agricultural shows and other public exhibitions by the Petitioner, and full and complete accounts of the nature and advantages of the invention were repeatedly inserted in various scientific Newspapers; but that, notwithstanding all the efforts of the Petitioner, his invention was for several years after the year 1859 only used by a small number of persons. That between the year 1859 and the present time the Petitioner's invention had been applied with continually increasing success in the making artificial manure, and in various other Trades, namely, (*a*) to the mixing of moist Sugars by Sugar manufacturers; (*b*) to the manufacture of Fire-bricks; (*c*) to the pulverisation of Ores; (*d*) to the manufacture of patent fuel; and (*e*) to the manufacture of Asphalte for Roads. That in the artificial manure manufacture, and other Trades, its adoption had been but by slow degrees, and only recently, become general, and the Petitioner had not as yet received adequate remuneration in respect of the use of his invention. That the Petitioner had, from the date of his Patent, given his constant, and since the year 1862 his undivided, attention to the invention, and had succeeded in making several improvements in the arrangement and detail thereof. That in respect of some of these improvements Letters Patent had been granted to him, dated respectively, the 22nd of October, 1868, the 5th of July, 1870, and the 2nd of August, 1870; and that as he had not been adequately rewarded for his invention he prayed for an extension of the term of the Letters Patent.

No *caveat* was entered against the petition.

Evidence was given of the novelty and public utility of the invention. With respect to the accounts of the profits of the Patent, it appeared that the amount of remuneration received, after deducting expenses, amounted to about £2,000. Among the charges against the Patent was deducted a charge of £400 a year for some years for the Patentee's personal expenses in bringing the Patent into public notice.

Sir *John Karslake*, Q.C.; Mr. *Aston*, Q.C.; and Mr. *E. Carpmael*, for the Petitioner.

The *Attorney-General* (Sir *John Coleridge*, Q.C.), and Mr. *Bowen*, for the Crown,

Drew attention to the charge of £400 a year in the account against the profits derived from the Patent.

SIR MONTAGUE SMITH:—

In this case the Inventor applies for a prolongation of the term of Letters Patent granted to him, in the year 1859, for an invention of "machinery for disintegrating or pulverizing artificial manures and other substances," and from the explanation which has been given to their Lordships, it appears that the invention is applicable for the purpose of reducing to powder, materials which are used in various important trades. The machine is one of that kind, the varied application of which may not be immediately obvious. It would probably require considerable experience of its use before Manufacturers would introduce it into their works, inasmuch as the machine is one which would displace those already employed in various manufactories. It is common experience that men are slow to change the machines they use, till they are perfectly satisfied by experiments that the new machine is better, and will produce results more cheaply than those which they already possess.

It appears, that the machine is one original in its kind; it is not merely an improvement upon an old machine, but one which is founded upon a new principle—a principle that may be well known to scientific persons, but which had not been applied practically to machinery on a large scale before the invention of Mr. *Carr*. Their Lordships are satisfied, that there is considerable merit in the invention, and that the machine is one which may be of considerable utility in various important manufactories. The object of it is to pulverize various materials by blows, by striking the materials, without the intervention of a fulcrum or any surface, upon which it may be crushed; and that mode of shattering or breaking the material into powder is stated by the Witnesses to have great advantage, not only in the manufacture of artificial manures, but

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for various other purposes; for instance, they state it to be a machine which may be very advantageously used in producing flour from corn, instead of the ordinary milling process. The merit and utility of the invention, therefore, in their Lordships' opinion, are great.

The next consideration is, whether the Inventor has received sufficient remuneration for his invention. There is no Opponent appearing at their Lordships' Bar to oppose the prolongation of the Patent. The Attorney-General, who appeared for the Crown, took no objection to the prolongation on the ground of any want of merit in the invention, nor has he assisted their Lordships by going into the accounts. It must be assumed that, so far as the Attorney-General is concerned, he has, upon looking into the details of the accounts, found that there was nothing on the face of them which required him to investigate them before their Lordships.

The usual evidence has been given, and there appears no reason to doubt that the accounts are accurate and contain a true statement of the expenses on the one side, and of the receipts on the other. And the result of the accounts is, comparing the expenditure with the profits received by the Inventor on account of the Patent, amount to about £2,000. Their Lordships think that is not an adequate remuneration for an invention of such excellence. The only suggestion made by the Attorney-General was, that the Patentee had charged in some years an annual sum of £400 for his time. Undoubtedly, a charge of that kind ought to be narrowly watched; but their Lordships are of opinion, that in this case the Patent may be properly debited with that annual amount; at all events, for the years in which it is made. It appears that Mr. *Carr* in the first, second, or third years after he had obtained his Patent, did not devote the whole of his time to carrying it out; but having then become more confident of the great value of his invention, he appears in the year 1863 to have given up the business in which he was engaged, that of a machine manufacturer, and to have devoted his whole time from that year to the improvement of the machine and to promote its adoption by the public.

Mr. *Carr* appears to be a Gentlemen of science and of great mechanical skill, and his time, from the evidence, appears to be fully as valuable as the amount that he sets upon it. Their Lord-

ships think, that in this case, as was allowed in *Perkin's Patent* (1), the sum of £400, which Mr. *Carr* has charged in each year, may be fairly debited to the Patent. On the whole their Lordships will recommend Her Majesty to grant a prolongation of this Patent for six years.

J. C. 1873 *In re* CARR'S PATENT.

Solicitors for the Petitioners: *Gregory, Rowcliffe, Rowcliffe, & Rawles.*

Solicitors to the Treasury, for the Crown.

JAMES BROWN . . . . . APPELLANT;

AND

ALEXANDER McLACHLAN . . . . . RESPONDENT.

J. C.* 1872 *Dec.* 11.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australia, law of—Fencing Act, No. 6, of 1865*—Construction—Pastoral Leases.*

The *Australian Fencing Act*, No. 6, of 1865, does not apply to waste lands in *South Australia* held on lease from the Crown for pastoral purposes.

If a Statute professes merely to repeal a former Statute of limited operation, and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shewn.

THIS was an action brought by the Appellant to recover half the value of a fence erected by him, between adjoining tracts of land respectively occupied by him and the Respondent, and of which it was alleged that the latter had availed himself. The action was based on the provisions of the *South Australian Fencing Act* of 1865-6, No. 6 (2).

The first count of the declaration stated, that the Plaintiff was

* *Present:*—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

(1) 2 Web. Pat. Cases, 16.

(2) The 4th section is set out in the judgment, *post*, p. 546.

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the Owner, within the true intent and meaning of the *Fencing Act*, No. 6, of 1865, of a fence, not being a party fence, and that such fence divided certain land known as *Avenue Range* from certain other land known as *Mount Scab*, and that the Defendant, being the occupier of the last-mentioned land, had availed himself of the fence within the true intent and meaning of the Act, and that the Plaintiff had duly made a demand in writing of the Defendant under that Act for payment of half the value of the fence, yet the Defendant had not paid the same. There was also a second count, alleging an agreement by the Defendant to pay half the value of the fence, and a breach of that agreement.

The Defendant pleaded, first, to the second count, a denial of the agreement. Second, to the first count, a denial that the Plaintiff was the Owner of the fence. Third, to the first count, a denial that the Defendant was the occupier of the adjoining land. Fourth, to the first count, a denial that the fence was a dividing fence. And, fifth, to the first count, a denial that the Defendant availed himself of the fence.

The action was tried before Mr. Justice *Wearing*.

At the trial admissions signed by both parties were put in. It was admitted between the parties, first, that the fences in respect of which the action was brought were dividing fences between the respective runs mentioned in the declaration. Secondly, that the Plaintiff was, at the time of the erection of the fence, a tenant of the Crown for pastoral purposes of the run called *Avenue Range*, and continued so therefrom to the time the action was brought, and that the fences were erected on the boundary line thereof by the Plaintiff. That any objection to the form of lease or leases under which the Plaintiff claimed was to be open to the Defendant, and a form of lease used by the Crown for leases for pastoral purposes was to be admitted as evidence to raise any point arising on the form of lease. Thirdly, that the Defendant was, at the time of the demand mentioned in the declaration, occupier of the *Mount Scab* run mentioned in the declaration, and before such demand had availed himself of the fences. And, fourthly, that the demand mentioned in the declaration was made as therein stated.

A form of lease and renewed lease was put in evidence.

The learned Judge directed the jury that there was unanswered

evidence that the Appellant was the Owner of the fence in question within the meaning of the *Fencing Act*, 1865; and the jury thereupon gave a verdict for the Appellant for the sum of £184.

A rule was afterwards obtained by the Respondent to set aside this verdict, on grounds, first, that the Judge who tried the action misdirected the jury in directing them that the Plaintiff (the Appellant) was the Owner of the fence within the meaning of the *Fencing Act*, 1865; secondly, that there was evidence that the fence was not a party-fence within the meaning of that Act; and, thirdly, that there was no evidence that the fence was not the property of the Appellant.

On the 1st of September, 1870, the rule having come on for argument, the same was made absolute, and a nonsuit was ordered to be entered for the Defendant (the Respondent) the Supreme Court being of opinion, that the *Fencing Act* of 1865 must be held only to apply to land purchased from the Crown, and not to land held for pastoral purposes, and that the Appellant was not entitled to any compensation in respect to the fence in question.

From the judgment so pronounced by the Supreme Court the Appellant obtained special leave to appeal (1).

Mr. *Field*, Q.C., and Mr. *Cunningham*, for the Appellant:—

The judgment is erroneous in point of law, as it proceeded on a mistaken conception of the intention and scope of the *Fencing Act*, No. 6, of 1865, and the legal effect of pastoral leases. The question really is, whether the Appellant was Owner of the Fence in question. As there was a clause in his Lease binding him to keep fences in repair, he would be the person primarily damnified by the destruction of the fence, it having been erected at his expense, so that according to both branches of the definition in the Act, No. 6 of 1865, he was Owner within the meaning of that Act. Clearly no prohibition to erect fences exists in the lease, the words in the lease implying a licence to erect fences of some kind. They referred to Ordinance, No. 10, of 1846, as to occupation of waste lands, repealed by Act, No. 6, of 1865, and contended that its provisions were extended by the latter Act to tenants of the Crown

(1) See Law Rep. 3 P. C. 458.

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under pastoral leases; the Colonial Regulations as to waste lands, and the *Colonial Act*, No. 17, of 1869, sect. 33.

Mr. *Strangways* (Mr. *A. Cohen* with him), for the Respondent:—

It is submitted, that the Appellant was not entitled to any compensation in respect of the Fence in question. As held by the Court below, Act, No. 6, of 1865, applies only to land purchased from the Crown, not to waste lands of the Crown demised for pastoral purposes. In fact the Appellant was a wrongdoer in erecting the Fence on the boundary of the run. The Judge who tried the action misdirected the jury in telling them that there was unanswered evidence that the Appellant was Owner of the Fence within the meaning of the *Fencing Act*, No. 6, 1865.

1872 *Dec.* 21.

Judgment having been reserved, was now pronounced by

SIR JAMES COLVILE:—

The Appellant and Respondent are the holders of contiguous runs in *South Australia*, leased by the Crown for pastoral purposes. In 1870, the Appellant commenced an action in the Supreme Court of the Colony for the recovery from the Respondent of half the value of a Fence erected by the former on the boundary line between the two runs. His right of action was founded on the 4th section of the local Statute known as the *Fencing Act*, 1865, which is in these words:—

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"When any occupier of land has heretofore availed himself, or shall hereafter avail himself, of any fence, not being a party fence, dividing such land from the land adjoining, the occupier in possession shall, upon demand, be liable to pay to the owner of such dividing fence one half part of the value at the time of such demand of so much of such fence as shall abut upon the land so occupied as aforesaid."

At the trial it was either admitted or proved that the Plaintiff was at the time of the erection of the Fence, which was finished in June, 1863, a tenant of the Crown for pastoral purposes, of the run called *Avenue Range*, and had continued to be so up to the date of the commencement of the action; that he had erected the Fence on the boundary line; that the Defendant was, at the time of the demand, occupier of the adjoining run known as *Mount*

Scab; and before the demand had availed himself of the fence within the meaning of the Act; and, further, that the demand was duly made. And it is admitted that, in this state of things, the Plaintiff was entitled to recover, if he were the Owner of a dividing fence within the true intent and meaning of the Act.

The jury, under the direction of the learned Judge who tried the cause, found a verdict for the Plaintiff, and assessed the damages at £184. The Defendant afterwards, under leave reserved at the trial, moved for and obtained a rule to shew cause why the verdict should not be set aside, and a new trial had; and, upon argument, the full Court, on the ground that the *Fencing Act* of 1865 must be held to apply only to land purchased from the Crown, and not to land held for pastoral purposes, ordered that the verdict entered for the Plaintiff should be set aside, and a nonsuit entered.

The Appellant being dissatisfied with this judgment applied for special leave to appeal on the ground that, although the sum in dispute was below the appealable amount, the question determined against him was one of general interest, and considerable importance in the Colony; and such leave was accordingly granted, but on the understanding that the appeal should be confined to the substantial question involved in the judgment of the Court, and that no formal objection should be taken on the ground that the Order was not for a new trial, but to enter a nonsuit.

The appeal has been fairly argued on that understanding, and the only question for their Lordships' determination is, whether the learned Judges of the Supreme Court were right in holding that the Statute does not apply to land held for pastoral purposes; or, in other words, that the Appellant was not the owner of a dividing fence within the meaning of the Act. If they are right, the foundation of the action fails. If they are wrong, the Appellant is entitled to retain his verdict, and to have judgment entered accordingly.

The object of the *Fencing Act*, No. 6, of 1865, as declared in its preamble, was to repeal the Ordinance (No. 10, of 1846) which had been passed to encourage the fencing of land; and to make other provisions in lieu thereof. It accordingly did repeal that Ordinance, and enacted the provisions upon which the present question has

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arisen. It is, however, to be observed that the particular right upon which the Appellant's action was founded was not for the first time enacted by the latter Act. It is substantially the same as that given by the first section of the repealed Ordinance to those who were within its operation. The Chief Justice, in delivering the judgment of the Supreme Court, stated that it had been conceded on the argument, that the Ordinance could not apply to fences upon lands held for pastoral purposes. Mr. *Field* was at first inclined to question the correctness of this admission (if made); but, as the argument proceeded, it appeared that in 1846, when the Ordinance was passed, waste lands occupied for pastoral purposes were held not under leases, but under mere licenses from the Crown; and that, consequently, it was impossible to bring the holders of such lands within the definition of an Owner contained in the 4th clause of the ordinance. It is, therefore, now admitted that, when the fence in question was completed, viz., in June, 1863, the Appellant could not have enforced under the then existing law any such right as he now asserts against the Respondent, or other occupier of *Mount Scab;* and further, that the Ordinance having no application to the waste lands held for pastoral purposes, was designed only to encourage the fencing of lands of which the ownership had been or might be thereafter purchased from the Crown. The only question, therefore, is, whether the Appellant has acquired the right on which he insists by force of the subsequently enacted *Fencing Act* of 1865.

Much of the argument before their Lordships has turned upon the peculiar nature of the tenure under which, in this Colony, waste lands are and have been held under the Crown for pastoral purposes.

It is unnecessary to trace with particularity the legislation which has taken place on this subject by means either of Orders in Council, Imperial Statutes, Acts of the Local Legislature, or regulations promulgated by the Executive Government under some statutory authority. It is sufficient to state that the public documents admitted by the consent of the parties in evidence on the record, and the Statutes to which their Lordships' attention has been directed, seem abundantly to establish the following propositions:—

First, that, ever since the first establishment of the Colony in 1834, there have been two distinct classes of real property: the first consisting of land absolutely sold by Government to Settlers and Immigrants for agricultural or building purposes; and, the other, of the residue of the waste lands, the ownership whereof remained in the Crown, forming as it were the public stock by the provident use of which the future development of the Colony was to be secured.

Second, that although the Crown has been in the habit of granting the temporary use and occupation of large portions of these waste lands for pastoral purposes, its power of doing so has always been jealously controlled; that, in the first instance, it granted mere licenses to depasture so many head of Sheep or Cattle without any definition of area, or the grant of an exclusive right in the soil; that when leases came into use its power of leasing was limited as to time (a limitation which, though enlarged from time to time, still exists); and that every lease so granted contained various conditions and provisions which went to restrict the powers of the Lessees; to secure certain privileges for the aboriginal inhabitants and the general public; and, above all, to reserve to the Crown the right of resuming the lands in certain events for public purposes, one of such purposes being the absolute sale of any part of them to agricultural Settlers.

Third, That, in particular, such leases were made voidable whenever the lands comprised in them should be declared to be part of a hundred; it being in such case provided that so much of the land included in the hundred as might remain waste, should be subject to certain rights of common in favour of the proprietors of the purchased and settled lands in the hundred; and even when not required for that purpose should not be demised to a pastoral lessee for more than one year.

From this state of things it has naturally resulted, as was pointed out by Mr. *Strangways*, that the written law of the Colony has had a tendency to divide itself into two distinct classes, viz., Acts designed to regulate the permanent use and enjoyment of the purchased lands, and Acts designed to regulate the temporary use and occupation of the waste lands, and especially to restrain the improvident alienation of large tracts of such land.

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The Ordinance of 1846 is admitted to have been exclusively a law of the former class.

It has, however, been argued that, inasmuch as the terms of the *Fencing Act* of 1865, are wide enough to embrace the tenants of the Crown under pastoral leases, that Act must be taken to apply to them unless they are excluded from its operation by express words, or necessary intendment; and that the Legislature in passing it, and in repealing the former Ordinance, must be presumed to have intended so to extend the provisions for the encouragement of fencing.

Their Lordships are not satisfied that this reasoning is correct. They conceive that, in dealing with a Statute which professes merely to repeal a former Statute of limited operation, and to re-enact its provisions in an amended form, they are not necessarily to presume an intention to extend the operation of those provisions to classes of persons not previously subject to them, unless the contrary is shewn; but that they are to determine on a fair construction of the whole Statute considered with reference to the surrounding circumstances whether such an intention existed.

Mr. *Field*, indeed, contended that the intention might be presumed since the same motives which induced the Legislature to encourage the fencing of the settled and purchased lands, would make it desire to encourage the fencing of the waste lands leased for pastoral purposes; and he also relied on the stipulations in the renewed leases which bound the tenant to keep existing fences in repair. But there are many reasons why the Legislature should encourage the fencing of lands in a hundred parcelled out amongst small proprietors, and containing certain common lands on which such proprietors have a right of pasturage, which have no application to the construction of boundary fences between the vast districts demised for pastoral purposes for short terms of years. Moreover, the judgment under appeal suggests various reasons founded on the Crown's right of resumption; and on the conditions imposed on the lessees in favour of the Aborigines and the public, which, if not absolutely inconsistent with the existence of the supposed intention, do at least render it highly improbable. Again, the stipulations for the keeping up the fences are satisfied by supposing that they apply to such fences as are required for

Cattle or Sheep pens, or other purposes connected with the use of the run. They do not necessarily imply a desire even on the part of the Crown to encourage the inclosure of vast tracts of waste land within boundary fences. And although their Lordships were referred to a late Act, No. 17, of 1869, of which the 33rd section contemplates the fencing in by pastoral lessees of areas of the demised land comprehending even twenty-five square miles; that enactment seems to shew that the encouragement to such fencing consisted in a reduction of the rent payable to the Crown, and contradicts rather than confirms the notion that the Crown lessees were within the operation of the *General Fencing Act* of 1865.

Again, looking to the provisions of the *Fencing Act* of 1865, itself, they seem to their Lordships to afford strong grounds for the conclusion that it does not extend, and was never intended to extend, to lands leased for pastoral purposes.

One of the definitions of "the Owner of a dividing fence" is "the person who, irrespective of this Act, by act of parties, is liable to keep such fence in repair." These words seem to point to a contract between a private proprietor and his sub-tenants, and hardly to include one between the Crown and its lessees. Again, as Mr. *Strangways* pointed out, the Fence contemplated is "one ordinarily capable of resisting the trespass of great cattle." It need not, in the first instance, be a Fence capable of resisting the trespass of Sheep, though, after it has become a party fence by the operation of the Act, or otherwise, it may be made so capable by either of the part-occupiers under sect. 6. Yet it would seem that the majority of runs are depastured by Sheep more generally than by large cattle; whereas, on the common lands in the settled hundreds, large cattle are found in greater numbers than Sheep.

Stronger arguments against the Appellant's construction of the Act are, however, to be found in the following considerations. If the Act applies to lessees for pastoral purposes, then the Crown, at the expiration of the lease of one of the runs, may find itself subject to all the liabilities which attach to the owner of land bounded by a party fence. Such a consequence, if intended, could hardly fail to be expressed. And if the Crown were not so bound, the occupier who had availed himself of the fence might incur the

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burthen of paying half its cost without reaping the corresponding advantage.

Again, it is clear that under the 4th section of the Act, if it is taken to apply to the lands leased for pastoral purposes, an occupier of such land might be retrospectively subjected to liability which, but for the Act, he would not have incurred. In the present case it is no doubt true that, though the fence was erected before the passing of the *Fencing Act* of 1865, the Appellant's right of action is founded on an act done by the Respondent after the date of the Act, in order to avail himself of the fence. But it might have been otherwise. The 4th section says: "When any occupier of land has heretofore availed himself, or shall hereafter avail himself of any Fence," &c. This provision is reasonable if it is limited to those who, under the repealed Ordinance, would have incurred a similar liability. But it is hardly reasonable to suppose that the Legislature intended by the clause in question to impose retrospectively a new liability on the occupiers of pastoral runs.

It does not appear to their Lordships to be necessary for the determination of this appeal to go the length of affirming the opinion expressed by the learned Chief Justice, to the effect that the erection of such a Fence as that in question was an actual violation of the Crown leases, and that both the party erecting it and the party availing himself of it were wrongdoers, a proposition which their Lordships think is extremely doubtful. But for the reasons above given they are of opinion, that the conclusion to which the Court unanimously, and with all the advantages of local knowledge, came upon the argument of the rule, viz., that the *Fencing Act* of 1865, does not apply to land held for pastoral purposes was correct; and they will accordingly humbly advise Her Majesty to affirm the judgment, and to dismiss this appeal with costs.

Solicitors for the Appellant: Messrs. *Torr, Janeway, Tagart, & Janeway.*

Solicitors for the Respondent: Messrs. *Gray, Johnson, & Mounsey.*

AZÉMA BOUCHÉ, otherwise EMMA LAGESSE . . . . . } Appellant;

AND

LUCIE ALLARD and ALPHONSE LAGESSE . . . . . } Respondents.

J. C.*
1872
Dec. 20.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Mauritius, law of—Code Civil—Will—Construction—Legacy—Quotité disponible—Succession—Election.

Construction of bequests in a Will, made in the *mystique* or secret form, in accordance with the *Code Civil*, the law prevailing in the *Mauritius*.

The Testator, at the time of making his Will, was living in cohabitation with a woman, by whom he had had two children, and whom he therein recognised and provided for as follows: "*J'ai reconnu pour mes enfants naturels, &c.; et je donne et lègue à ces enfants la moitié de tous les biens généralement quelconques que je laisserai au jour de mon décès;*" and disposed of the whole of his "*quotité disponible*" in favour of other Legatees. The Testator afterwards married the Mother of his children, who thereby, by the *Code Civil*, Art. 331, became legitimized; but neither before nor after his marriage revoked, altered, or republished his Will, or left any other heirs entitled to the succession. On a suit by one of the Legatees for the recovery of a legacy bequeathed to her by the Will, against the Mother of his children acting as testamentary Executrix of the Testator, who, among other pleas, contended that, even if the bequest was valid it ought to be reduced, inasmuch as that and the other legacies given by the Will exceeded the disposable proportion (*quotité disponible*) of the Testator's succession, the children being by the Will entitled to one-half of such succession in preference to all other legacies given by the Will:—*Held*, by the Judicial Committee (affirming the judgment of the Supreme Court), that upon the true construction of the Will, the legacy given to the children was a gift of a moiety of the whole succession, and not a moiety of the *quotité disponible* only; and that as the children were by law entitled to a legal reserve of two-thirds of the estate of their late Father, if they elected to claim such reserve, which would reduce the Plaintiff's legacy, the Mother, as their Guardian, must make election between the one-half bequeathed by the Will and the two-thirds, the legal reserve.

THE action out of which this appeal arose was brought in the Supreme Court of *Mauritius* by the Respondent, *Lucie Allard*, against the Appellant, *Azèma*, otherwise *Emma*, *Lagesse*, Widow,

* *Present:*—Sir James William Colvile, Sir Barnes Peacock, Sir Montague Edward Smith, and Sir Robert Porrett Collier.

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as Guardian of *Cécile Lagesse* and *Marie Lagesse*, infants, and *Alphonse Lagesse*, testamentary Executor of *Léonce Lagesse*, deceased. The object of the action was to recover a legacy of $10,000 bequeathed to the Respondent, *Lucie Allard*, by the Will of *Léonce Lagesse*.

The Respondent was the Sister of the Testator, and the Wife of *Timothée Allard*, and was, in the absence of her Husband from the Island, authorized by a Judge's Order to accept purely and simply the legacy of $10,000, and to ask for the delivery thereof from the heirs before a competent Court.

The Will, upon the construction of which the questions in this appeal arose, was dated the 29th of December, 1866, and was made in the *mystique* form, being deposited with a Notary without any disclosure of its contents, and, so far as is important to the questions raised in the appeal, was as follows:—

"1° *J'ai reconnu pour mes enfants naturels Cécile et Marie, filles de Madlle. Azéma Bouché, aussi appelée Emma Bouché; je déclare reconnaître par le présent aussi pour mon enfant naturel, l'enfant dont la-dite Demoiselle Bouché est actuellement enceinte; et je donne et lègue à ces trois enfants (Cécile, Marie, et celui dont Madlle. Bouché est enceinte) la moitié de tous les biens généralement quelconques que je laisserai au jour de mon décès.*

"2° *Je donne et lègue à Madlle. Emma Bouché sous-nommée une somme de vingt mille piastres, plus mon immeuble, avec tout ce qui en dépend, situé au Port Louis à l'angle des Rues Madame et des Créoles, acquis par moi de Mr. Arthur Edwards; et en outre tous mes meubles meublants et autres effets mobiliers qui se trouvent à 'Plaisance' à l'exception de ma voiture et de mon cheval.*

"3° *Je donne et lègue à Mad^e Allard, ma sœur, une somme de dix mille piastres, avec la condition expresse que si elle venait à mourir sans enfants, la-dite somme reviendra pour une moitié à mes trois enfants naturels sus-nommés, et pour l'autre moitié à mes autres héritiers.*

The child spoken of in the Will as in *ventre sa mère* died shortly after birth in the lifetime of the Testator.

The Testator died on the 10th of April, 1870, without having revoked his Will, having previously, on the 10th of August,

1867, married the Appellant, *Azéma Bouché*, and by the *Code Civil*, Art. 331, the two children termed in the Will "*enfants naturels*," were thereby made legitimate.

According to the Civil Code, Art. 913, in the case of a Testator leaving two legitimate children, the *quotité disponible*, or amount which he can leave to other parties, is one third of his whole property; and, according to the combined effect of Articles 757 and 908, the amount which he was empowered to leave to his illegitimate children where he had Brothers and Sisters or relations in an ascending line, but no legitimate issue, is one-half of his property, and they are, under the Civil Code, in any event entitled to one-third.

The declaration in the action sought payment from the Appellant of the legacy of $10,000, with costs and interest.

The Appellant put in three pleas, two of which she afterwards abandoned. The third plea alleged that, even admitting that the legacy be good and valid in law, the same ought to be reduced according to law, inasmuch as the above legacy and the other legacies which had been made to several parties by the late *Léonce Lagesse* by the Will referred to in the Plaintiff's declaration exceeded the disposable proportion (*quotité disponible*) of the latter's succession; and further, that as the minors *Lagesse* were themselves, under the Will, Legatees of one-half of the disposable proportion (*quotité disponible*) of their late Father's succession; such legacy, the Appellant contended, ought to be paid in preference to all the other legacies made by *Léonce Lagesse*.

The Respondent filed a replication joining issue on the third plea, and, moreover, raised the point that, even if the children of the Appellant were entitled to a legacy, they had not any preference over the other Legatees.

Judgment was given by Sir *Charles Farquhar Shand*, Chief Judge, and the acting second Puisne Judge, *Gorrie*, rejecting the third plea of the Appellant, and ordering the Appellant to elect within two weeks, between the one-half of the estate under the Will, and the reserve of two-thirds which the Appellant's children were entitled to claim as legitimated children; and directed the costs to come out of the estate.

The appeal was from this judgment.

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Mr. *Mackeson*, Q.C., Mr. *Westlake*, and Mr. *S. Bryce*, for the Appellant:—

The legal import and effect of the Will of the late *Léonce Lagesse* involve this question, what is the amount for which the two infant children, *Cécile* and *Marie*, of the Testator, on behalf of whom *Emma Lagesse*, their Mother, defends as guardian, are entitled by virtue of such Will, under the *Code Civil* and succession according to French law, received and prevailing in *Mauritius*. It is, therefore, one of construction, and the application of the *Code Civil* to the circumstances disclosed. What, then, is the amount to which the two children, *Cécile* and *Marie*, are entitled by virtue of the Will and such rules of succession? This question has become somewhat complicated by the marriage of *Léonce Lagesse* and the Appellant, which took place in 1867, a few months after the date of the Will. By this marriage the children, *Cécile* and *Marie*, having been previously recognised, became legitimated, *Code Civil*, Art. 331, and their rights of succession to their parents' property were very considerably altered. The rules laid down in the *Code Civil* on this point are, first, that natural children, that is, illegitimate and unrecognised, as such have no claim upon the property of their deceased parents, either Father or Mother, who may by Will dispose of all their possessions, without in any way noticing the existence of merely natural children—"*Les enfants naturels ne sont point héritiers; la loi ne leur accorde de droit sur les biens de leur père ou mère décédés que lorsqu'ils ont été légalement reconnus:*" *Code Civil*, Art. 756; *Les Codes annotés de Sirey*, *Tom.* I., p. 318 [Ed. 1862]. Secondly, other children, whether natural children legally recognised, or legitimated children, have a claim upon the property of their parents at their death; and are looked upon as co-owners with their parents, so that upon the death of the latter, they succeed to a certain portion of their parents' property, and of this right the parents are unable to deprive them. This portion is thus regulated in case of natural children legally recognised—"*Si le père ou la mère a laissé des descendans légitimes, ce droit est d'un tiers de la portion héréditaire, que l'enfant naturel aurait eue s'il eût été légitime; il est de la moitié lorsque les père ou mère ne laissent pas de descendans, mais bien des ascendans, ou des frères ou sœurs; il est de trois quarts lorsque les père ou mère ne*

laissent ni descendans ni ascendans, ni frères ni sœurs :" *Code Civil,* Art. 757; *Les Codes annotés de Sirey, Tom.* I., p. 318. Thirdly, in the case of legitimate children, this portion is thus regulated—"*Les libéralités, soit par acte entre vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant légitime; le tiers, s'il laisse deux enfans; le quart, s'il en laisse trois ou un plus grand nombre :*" *Code Civil,* Art. 913; *Les Codes annotés de Sirey, Tom.* II., p. 399. Fourthly, natural children, recognised or not, cannot receive by donation from their parents, whether by gift *inter vivos* or by Will, more than what is reserved to them by Art. 757 of the *Code Civil,* viz., at most only half of their parents' property. "*Les enfants naturels ne pourront, par donation entre vifs ou par testament, rien recevoir au-delà de ce qui leur est accordé au titre des Successions :*" *Code Civil,* Art. 908; *Les Codes annotés de Sirey, Tom.* III., p. 394. And lastly, a Will is revoked in two ways only; by a later Will, or by a public instrument declaring that the Testator has changed his purpose: "*Les testamens ne pourront être révoqués, en tout ou en partie, que par un testament postérieur, ou par un acte devant notaires, portant déclaration du changement de volonté :*" *Code Civil,* 1035; *Les Codes annotés de Sirey, Tom.* III., p. 464.

Here the Testator had no heirs, descendants or ascendants, either at the date of the Will or at his death, other than the children, *Cécile* and *Marie,* but he had Brothers and Sisters. The children were not legitimated at the date of the Will, but they were recognised in it, they were also "*en concurrence*" with Brothers and Sisters of the Testator, consequently, by Art. 757 of the *Code Civil,* they were legally entitled to and could not be deprived of one-half of the Testator's property, and by Art. 908 they could not receive, even by express gift *inter vivos* or bequest, more than this half. By the Will the Testator has given them one-half, independently of the contingent gift, and if their *status* had remained unchanged it is evident they would have been entitled to one-half only, whether they claimed under the Will or by virtue of their right of succession. But, on the subsequent marriage of their Father and Mother, *Léonce Lagesse* and the Appellant, they became legitimated: and it is with reference to this event that the Will has to be construed. The Will was not annulled by

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such marriage; it speaks from death, not from the day of its execution, and the children, being legitimated and two in number, can claim, by virtue of their right of succession under Art. 913 of the *Code Civil*, two-thirds of their Father's property; and the question is, whether they are by virtue of the Will entitled to anything in addition to these two-thirds.

We submit, that they are, in addition, entitled to one-half of the one-third over which the Testator had a power of disposition, and that independently of any contingent gift. The shares (varying according to circumstances) in a deceased's assets which are reserved to certain persons, constitute the property of these persons, at least to this extent, that the deceased is unable to deprive them of it; he may increase, save where restricted by Art. 908 of the *Code Civil*, or add to these shares, but he cannot lessen them. Now, the Testator made his Will at a time when, having two natural recognised children, he could dispose of one half of his property only, and when those children could take from him by way of donation no more than one half of his property. The Will, however, has to be construed with reference to the totally different circumstances existing at the time of his death, when his power of disposition was restricted to one-third of his property, and when his children, being legitimated, succeeded *de jure* to the remaining two-thirds, and could have received from him the whole.

The contention of the Respondent, *Lucie Allard*, in the Court below, was, first, that the legacy given to the children, *Cécile* and *Marie*, is one-half of the property of which the Testator died possessed; and, secondly, that the children are put to their election between such one-half and the two-thirds reserved to them by Art. 913 of the *Code Civil*. But the Appellant submits, firstly, that as, at the date of the Will, the Testator bequeathed o his children all that in their then legal *status* he could give them, or they could receive by way of donation from him, so, when they had afterwards been legitimated, he must be held to have given them by the Will, if not all he could give them, at least something in addition to their legal reserve of two-thirds, *Tenillier* v. *Delpench*, 1833, *Dalloz*, 218–9; and secondly, that no election is imposed upon them, for the Will must be held

to apply to the *portion disponible* only, viz., to the one-third of the Testator's property, of which they are entitled to one-half in addition to their legal reserve, that is, five-sixths of the whole property, independently of any contingent gift. Our contention, therefore, is, first, that by the French law prevailing in *Mauritius*, the rights of children and other heirs to their legal reserve in the assets of a deceased are fixed beyond the power of a Testator to destroy or limit, and that the Will in question is only applicable to the *quotité disponible* over which the Testator had the power of disposition; and, secondly, that the Testator's children ought not to be put to their election between the legal reserve and the legacy given them by the Will, they being entitled to their legal reserve of two-thirds, and also to one-half of the *quotité disponible*, and the other contingent gifts under the Will; and, lastly, that the costs of suit ought to be put out of the *quotité disponible* only.

The Solicitor-General (Sir *George Jessel*), and Mr. *E. Cutler*, for the Respondents:—

Admitting this to be only a question of construction of the Will of *Léonce Lagesse* it is submitted, that the words "*la moitié de tous les biens généralement quelconques que je laisserai au jour de mon décès*," cannot be restricted without violence to the *quotité disponible*. There is no reference in the Will to reserve, or *quotité disponible*, but a gift of half of the Testator's property. The whole feature of the Will shews, that the Testator intended to dispose of his whole estate, the legal reserve of the heirs as well as the *quotité disponible*. The children of the Testator being illegitimate at the time of making his Will, could not by any means receive by Will or otherwise more than one moiety of his property, the Testator at the time having legitimate Brothers and Sisters, Nephews and Nieces. If there was any reserve it must be taken to be three-eighths, not one-half. Succession is one thing, reservation is another. Art. 757–9 of the *Code Civil* applies only to successions: *Demolombe, Traité des Testaments, Tom.* II., p. 232; *Les Codes annotés de Sirey, Tom.* I., p. 176, sect. 3.

The legacy given by the Will to the Testator's children *Cécile* and *Marie* is one-half of the property of which the Testator died possessed, *Code Civil*, Arts. 756–7, but being subsequent to the date

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of the Will legitimized by the marriage of the Testator with their Mother, they could at most be but put to their election between such one-half, and the two-thirds reserved to them by law, as stated in Art. 913 of the *Code Civil*, and by that Article they would be entitled to claim two-thirds of the succession as the legal reserve left by the Testator, and also one-half of the remaining third as preferential legatees in terms of the Will. Their claim, therefore, is for five-sixths of the succession; and the question comes again to one of construction, whether the Testator intended that the children should have the legacy as something in addition to their legal reserve, or that the legacy should be in place and room of all claims they might have on his estate. Though by the French Code a Will is not revoked by subsequent marriage, *Code Civil*, Art. 1035, yet the intention of the Testator is to be gathered from the Will itself, and must be taken into account, especially when, as in this case, he has made ample provision for his children, and in effect disposed of all his disposable estate at the period of making his Testament. The right to accumulate legacies is a contested point in French law. *Code Civil, Liv.* III., tit. II., ch. III., tit. "*De la Portion de biens disponible,*" Arts. 913 and tit. "*De la Réduction des Donations et Legs,*" Art. 920; which must be read with Arts. 843 to 869, tit. "*Des Successionis.*" *Les Codes annotés de Sirey, Tom.* I., pp. 351 and 399 [Ed. 1862], gives a *résumé* of the authorities on these Articles, and the right to accumulate legacies and donations with legal reserves. It is plain, as we contend, from the whole texture of the Will, that the Testator intended by his Will to dispose of his whole estate, and that he did so dispose of it. The question, then, is, what is the effect upon the Testator's Will of the claim of legal reserve made by the Appellants, who claim as heirs? Can they enjoy the legal reserve, and at the same time take the bequest in their favour? The amount of the legal reserve is two-thirds of the whole estate, but the bequest, we contend, as has been held in the Court below, is limited to one-half of the whole estate, which would make the claim of the Appellant amount to seven-sixths, or more than the whole. This, however, is not contended for, as on behalf of the Appellant it is said, the legal reserve must first be deducted, then the Will applied to the remaining third of the estate:

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Code Civil, Art. 1010. In this way the children would get one-half of the third, and the other Legatees the remainder. This must be on the assumption that the Testator intended that his children should obtain this benefit in addition to the reserve. We contend, that it is plain from the Will itself, as well as all the circumstances in the case, that the Testator did not intend to bequeath one-half of the *quotité disponible* in addition to the legal reserve to his children. They may, however, if they please, but they have not so elected, decline to accept under the Will and take as heirs, and then the law gives them two-thirds of the Testator's property in place of one-half; but they cannot also, if they elect to take under the Will, claim one-half of the remaining third, and it was upon these principles that the Supreme Court of *Mauritius* decided the case.

Mr. *Mackeson*, Q.C., in reply.

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Judgment was deferred, and now delivered by

SIR JAMES COLVILE:—

The facts in this case are undisputed. On the 24th of December, 1866, *Léonce Lagesse*, who was domiciled in the Island of *Mauritius*, made his Will in what is termed the *mystique* or secret form. He was at that time living in cohabitation with the Appellant, who had had two children by him, and was then *enceinte* of a third.

The first clause of the Will, upon the construction of which the determination of this appeal depends, is in these words:—"*J'ai reconnu pour mes enfants naturels Cécile et Marie, filles de Mademoiselle Azéma Bouché, aussi appelée Emma Bouché; je déclare reconnaître par le présent, aussi pour mon enfant naturel, l'enfant dont la-dite Demoiselle Bouché est actuellement enceinte*; *et je donne et lègue à ces trois enfants la moitié de tous les biens généralement quelconques que je laisserai au jour de mon décès.*"

By the second clause he made certain bequests in favour of the Appellant; by the third he gave a sum of $10,000 to his Sister, *Madame Allard* the Respondent, adding these words, "*Avec la condition expresse que si elle venait à mourir sans enfants, la-dite somme reviendra pour une moieté à mes trois enfants naturels sus-nommés, et pour l'autre moitié à mes autres héritiers.*" By subsequent clauses he gave various other legacies, and by the 15th he gave all the

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residue of what he might leave to his Brother *Edmond*, his Brother *Alphonse*, his Sister *Madame Allard*, and the children of another Sister named *Madame Roussell*, in four equal shares. By the 16th clause he made *Edmond* and *Alphonse* his testamentary Executors, and by the 17th he imposed as a condition on the legacy given to the Appellant, that she should not have "*la jouissance légale des biens qui proviendront à ses trois enfants sus-nommés de ma succession*;" but should administer that property under the control of his Brother *Alphonse*, and a Notary named *Pelte*, as her councillors, and further directed that two particular debts of $55,000 and $10,000 which were due to him should form part of his children's share in his succession.

The child of which the Appellant was *enceinte* at the date of the Will was afterwards born, but died in the Testator's lifetime; and it being now admitted that her interest in the legacy, whatever it may have been, survived to the other children, the Will may be read as if there had been no mention of her therein.

On the 10th of August, 1867, the Testator married the Appellant, thereby legitimatizing her children; and on the 28th of April, 1870, he died without having, either before or after his marriage, revoked, altered, or republished his Will.

The law applicable to these facts, so far as it relates to the *status* of the children and their general rights in their father's estate, is equally undisputed.

By the Will the children were placed in the category of "*enfants naturels reconnus*." As such, their Father leaving Brothers and a Sister, they would have been entitled to one-half of his succession if he had died intestate. If he died testate, they would have been entitled, as is now admitted on both sides, by analogy to the rights of legitimate children, if not by the letter of the Code, to a legal reserve to the extent of three-eights of the succession, if there were three of them, and of one-third if there were but two of them. And their Father was precluded by the 908th Article of the *Code Civil* from exercising his power of disposition over the rest of the property in their favour, so as to make their share exceed one-half of the whole succession; or, according to some authorities (as will be afterwards seen), even so as to give them more than their legal reserve. By the marriage the children were raised to the *status* of

legitimate children. They, therefore, became the sole legal heirs of their Father, entitled as such to the whole succession if he died intestate, and to a legal reserve of two-thirds of it if he died testate. And they further became entitled, if in competition not with other heirs, but with the legatees of the Testator, to take the benefit of any legacy, whatever its amount, which he might give them by his Will, in addition to their legal reserve, out of the remaining one-third of the succession, unless he should express an intention that the gift was not to be cumulative,

These propositions, which were ultimately admitted by both sides during the argument, are supported by Articles 334, 756, 757, and 908, and by Articles 331, 745, 913, and 857 of the *Code Civil.*

On the 28th of April, 1870, the Respondent, *Madame Allard,* brought her suit against the Appellant, "acting as the legal Guardian of *Cécile Lagesse* and *Marie Lagesse,* the two infant children born from her marriage with the Testator, *Léonce Lagesse,*" and against *Alphonse Lagesse,* "acting as the Testamentary Executor of the Testator," for the recovery of the legacy of $10,000 bequeathed to her by the Will, with interest thereon from the date of the service of the declaration on the Defendants.

The Appellant originally filed three pleas. The first simply alleged, that the Plaintiff had no right of action against the minors *Cécile Lagesse* and *Marie Lagesse,* for the causes set forth in her Declaration. The second alleged, that the legacy given to the Plaintiff was null and void to all intents and purposes, inasmuch as it contained a "*substitution prohibée,*" or prohibited entail, within the meaning of the 896th Article of the *Code Civil.* The third plea was to the effect that, even if the legacy were good and valid in law, it ought to be reduced according to law, inasmuch as that and the other legacies given by the Will exceeded the disposable proportion (*quotité disponible*) of the Testator's succession; and inasmuch, further, as the above-named minors, *Lagesse,* were themselves, under and by virtue of the Will, the Legatees of one-half of the (*quotité disponible*) disposable proportion of their Father's succession, which legacy the Defendant alleged ought to be paid in preference to all the other legacies given by the Testator.

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The Respondent filed her replication on the 14th of June, and on the 13th of July, 1870, the Appellant filed a notice, whereby she formally abandoned her first and second pleas, and declared that she would on the trial of the cause, rest her defence only upon the third plea, which she had pleaded on behalf of her minor children.

The cause was accordingly tried on that plea, and the Court held, that upon the true construction of the Will the legacy given by its first clause was a gift of a moiety of the whole succession, and not of a moiety of the "*quotité disponible*" only. The formal judgment was as follows:—"The Court rejects the pleas of the Defendant, Widow *Lagesse;* but, inasmuch as the children of the late *Léonce Lagesse* are entitled to a legal reserve of two-thirds of the estate of their late Father, and that if they determine to claim such legal reserve, the amount of the Plaintiff's legacy may have to be reduced, the Defendant is hereby ordered within two weeks from this date, to state, whether she takes the one-half of the estate under the Will, or the reserve of two-thirds established by the law in favour of the children. Costs of the action hitherto to be costs of succession." The appeal is against this judgment.

The Appellant, by her case and at the Bar, has sought, notwithstanding her former abandonment of her second plea, to raise again the question, whether the legacy to the Respondent is not void by reason of its containing a forbidden substitution; and she has also taken objection to the judgment for treating the costs of the action up to that stage as costs of succession. But the principal question argued before their Lordships has been, as it was in the Court below, that which arises on the third plea, viz., whether upon the true construction of the Will, the minors are entitled to a legacy of one-half of the ("*quotité disponible*") disposable proportion of their Father's succession, in addition to their legal reserve. The Appellant has by her Counsel given up the point raised by the last sentence of the plea, and no longer contends that this legacy, if given, is payable in preference to the other legacies.

The present claim, therefore, on behalf of the minors, is, that they are entitled to two-thirds of the whole succession as their legal reserve; and also to a moiety of the remaining one-third or

to one-sixth of the whole estate as a legacy, but subject as to the latter to any reduction which may be necessary by reason of the insufficiency of the estate to pay that and the other legacies in full.

The determination of the question thus raised seems to their Lordships to depend solely on the interpretation of the Will; and in particular the first clause of it.

There was some discussion at the Bar as to the rule of construction to be applied. Their Lordships are, however, of opinion, that it is their duty to consider, and if possible ascertain, what were the meaning and intention of the Testator when he penned or dictated the words: "*Je donne et lègue à ces trois enfants la moitié de tous les biens généralement quelconques que je laisserai au jour de mon décès*;" and that the surrounding circumstances, if any, which are to enter into the consideration of that question, must be those which existed at the date of the Will. They are also of opinion, that when the true construction of the gift has been thus ascertained, the construction cannot be affected by any alteration in the circumstances of the Testator between the date of his Will and that of his death. The words cannot be taken to mean one thing at one time, and another thing at another time. Mr. *Mackeson*, in his reply, as their Lordships understood him, fairly admitted this; but argued for another proposition, which their Lordships think is equally incontestable, viz., that although the construction of the gift must be constant, its operation and effect may vary at different times, and must ultimately be determined by the circumstances of the Testator, and of his family, at the time of his death.

Thus, if the true construction of the clause be that it imports a legacy of a moiety of only the disposable proportion of the estate, the amount of that legacy will be determined not only by the state of the Testator's assets at the time of his death, but by the fact that by means of their legitimation the children had acquired a right to a legal reserve of two-thirds instead of one of one-third. And a further consequence of the legitimation of the children was, that they thereby became entitled to claim the full benefit of the legacy in addition to their legal reserve; whereas, had their *status* remained unaltered, they could at most have claimed the difference between their legal reserve and one moiety of the whole succession.

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On the other hand, if the Respondent's construction is to prevail, and the claim is to be held to import a gift of one-half of the whole succession, it may have come to pass that, although such a disposition was for the benefit of the children so long as they were merely "*enfants naturels reconnus*," because it gave them something in addition to their legal reserve, it ceased to be of any benefit to them when, as legitimate children, they had become entitled to more than one-half of the succession by way of legal reserve.

Their Lordships have now to consider which of the two constructions is the true one.

The words of the clause in question, taken in their natural sense, are undoubtedly consistent with the construction put upon them by the Court below; and the circumstances of the Testator when the Will was made strongly favour that construction. His first and undisputed object was to acknowledge the children as his natural children. He must be taken to have known that by doing that he gave them a right to one-half of his succession, if he died intestate; and that, if he died testate, he could not give them more, although he might cut down their share to their legal reserve of three-eighths, or one-third, according to their number. If the state of the family had remained unaltered, it would be difficult, if not impossible, to resist the conclusion that the intention of the Testator when he sat down to make his Will was to ensure to his children all that the law would have given to them if he had died intestate; and that he, therefore, determined to divide his whole possessions into two equal parts, giving one to the children, and disposing of the other, of which they could not in any circumstances take any share, amongst the other members of his family. Every clause and every word of the Will is consistent with this construction. The 17th clause in particular shews that, at least in that part of his Will, the Testator was advisedly dealing with his succession, including the children's reserve. On the other hand, the construction for which the Appellant contends, viz., that the first clause is a gift only of one moiety of whatever might be the "*quotité disponible*" at the time of the Testator's death, implies that when he made his Will he was intentionally giving to his children more of his estate by three-sixteenths or one-third, as the

case might be, than the law would permit them to take. It is true that *Demolombe*, in commenting upon the 908th Article of the Code (see *Traité des Testaments, Liv.* iii., *Tit.* 2, part 1, ch. 2, Article 554 ter., *Tom.* I., p. 557), puts the case of a disposition somewhat similar to that which the construction of the Lower Court in this case assumes the Testator to have made, and comes to the conclusion, that it is not competent to a Testator having a natural child, and a Brother, to will away, or to throw the whole of his legacies upon that Brother's moiety, leaving the moiety of the natural children untouched. And he seems to hold, that the effect of the 908th Article is, that if a Father dies testate, leaving legal heirs, his natural children cannot take more than their legal reserve. He admits, however, that this is a contested and doubtful question. The antecedent improbability, therefore, of such a disposition is not so great as that of one which would necessarily contravene the 908th Article.

Mr. *Mackeson* insisted, that the legacy in question is a universal legacy within the terms of the 1003rd Article of the Code. Being the gift of an aliquot part only of the whole succession, or of "*la partie disponible*" (as the case may be), it seems to be rather a legacy "*à titre universel*," as defined by the 1010th Article. The distinction, however, may be immaterial for the purposes of the argument under consideration. Mr. *Mackeson* further argued that, inasmuch as a Testator cannot give more than that over which the law gives him a power of disposition, a universal legacy, however expressed, must be taken to be only a gift of that which the Testator might give to a stranger; and, therefore, that, according to French law, if a Testator in terms bequeaths "that of which he may dispose," or even his "*quotité disponible*," that is as much a universal legacy as one which in the amplest terms professes to dispose of the Testator's whole property. But why is this? The reasons will be found in *Demolombe's* "*Traité des Testaments*," *Liv.* iii., *Tit.* 2, ch. v., Art. 540, *Tom.* IV., p. 472. He says a legacy is universal when it gives to the Legatee a possible right to all that the Testator may have at his decease; and he goes on to shew that this is the effect of a gift which is in terms one of only "*la partie disponible*," since it is possible, that by the death in the Testator's lifetime of his children, or other heirs entitled to a

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reserve, the Legatee may eventually become entitled to the universality of the estate. Again, it is no doubt true, that a universal legacy, which purports in the amplest terms to be a gift of all the property which the Testator may may have at his decease, may take effect only as a gift of "*la partie disponible*;" but that is because the law has imposed upon the succession certain charges in the way of legal reserve or otherwise, which override and control the terms of the gift and limit its effect. It is, however, difficult to see how these different propositions affect the question of construction which their Lordships have to decide. It does not follow because a legacy of the whole succession and a succession of "*la partie disponible*" may in some cases have the same effect, that therefore, when they would not have the same effect, a Testator who has used the larger terms is to be taken to have meant only that which would have been expressed by the other and more restricted terms. Their Lordships can find nothing in the Civil Code which supports the proposition that a Testator, whatever language he may have used, cannot be taken to have intended to deal with any but the disposable proportion of his succession. On the contrary, that Code in all its elaborate provisions for "*rapport*" and "*partage*" seems to assume that Testators may in point of fact attempt to exceed their legal power of disposition. And in *Liv.* iii. tit. II., ch. vii. (Arts. 1075 *et seq.*) it expressly gives to a Father the power of directing by Will what particular portions of his estate shall form part of the legal reserve of his children. The first clause of the Will in question, if construed as the Court below has construed it, merely sought to secure that the children should receive the full moiety of the succession, to which they would have been entitled *ab intestato*. The circumstance that by reason of subsequent events such a provision has become practically inoperative is no reason for holding that it was never made.

The various decided cases cited from *Sirey* and *Dalloz* do not really affect the question of construction. They undoubtedly shew a preponderance of authority in favour of the proposition that an heir entitled to a reserve is, when in competition with Legatees, either universal or particular, entitled to claim the benefit of any legacy which may have been given to him out of the "*quotité disponible*," in addition to his legal reserve, unless the Testator has clearly manifested

an intention to the contrary. But this proposition was not contested in the present suit. The only question was, whether there was any legacy capable of so taking effect?

It was further argued by Mr. *Mackeson*, that the construction for which he contended would be natural, had the will been republished by the Testator after his marriage. The answer to that argument is, that the Will was never republished; and that it is, therefore, unnecessary to consider how far the altered circumstances of the Testator would have affected its construction if, having been republished, it had to be construed as a document speaking from the date of the republication. It seems to their Lordships that, in the absence of republication, it is mere matter of speculation, whether the Testator, in leaving his Will after his marriage as it was before that event, acted from mere carelessness, or advisedly. If he did so advisedly, it would not follow that he must, therefore, be taken to have conceived that the legacy was one which would take effect in favour of his legitimatized children. He may have thought that their reserve of two-thirds was a sufficient provision for them, and have intended the remaining one-third to be applied, so far as it would extend, in satisfaction of the other legacies. It is clear that he cannot have had a continuing intention to secure to his children, after they were legitimatized, all that the law would have given to them on an intestacy; since in that case he would have revoked the Will, and allowed the whole succession to pass to them by operation of law. Again, if he advisedly omitted to revoke his Will, he must have had a continuing intention to make some provision for the other members of his family; nor does it seem probable that having originally bequeathed to them legacies to an amount which, apparently, exceeds one-third of the whole succession, he should have left their legacies unqualified if he intended to leave only one-sixth of his estate to satisfy them. It is, however, obviously unsafe to act on speculations of this kind. The duty of a Court of Justice in such a case is to ascertain, as it best may, by the ordinary rules of construction, what the Testator intended when he made his Will; and to give effect to that intention so far as present circumstances will permit. And the conclusion to which their Lordships have come is that, in this case, the Court below has put

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the right construction upon the disputed clause of the Will in question.

Two other points which were raised at the Bar remain to be noticed. The first is, that which is founded on the alleged invalidity of the gift to the Respondent, by reason of its containing a forbidden substitution. Their Lordships are clearly of opinion that, after the formal abandonment of this point in the Court below, it would be improper to allow it to be argued here. They give no opinion upon it further than by saying that it does not appear to them to be by any means so clear as the learned Counsel for the Appellant have represented it to be (see *Demolombe, Traité des Donations*, &c., *Tom.* I., pp. 67 *et seq.*, Articles 68 *et seq.*) If the minors have any substantial interest in raising the question, their proper course is to apply to the Court below for leave to do so in the subsequent proceedings of the cause. The judgment under appeal is obviously only an interlocutory one, and must be followed by proceedings for the due division and administration of the assets, and the proportionate abatement of the different legacies. It is difficult, however, to see how the minors can be interested in raising this question, if they elect to take (as no doubt their Guardians will, for them, elect to take) their legal reserve, since, in that case, they will receive in full all that upon the true construction of the Will they are entitled to. Had the Appellant's construction prevailed, the minors would have had a material interest in disputing the validity of any particular legacy, if, as would seem from the 1013th Article of the Code, and *Demolombe's* Commentary thereon (*Traité des Testaments, Liv.* iii., *Tit.* ii., ch. i., Articles 602 *et seq.*), they, as Legatees, "*à titre universel*," are not only not entitled to be paid in preference of the particular Legatees, but are bound to contribute rateably with the heirs to the extent of "*la quotité disponible*" towards the payment of particular legacies. It was, however, suggested that, in their quality of heirs entitled to a reserve, they might incur responsibility to the other persons interested in the estate by reason of their omission to raise this question. Their Lordships cannot conceive that they can do so, particularly in this suit, which seems likely to become a general administration suit. But this too is a point which, if there be anything in it, should be

submitted to the Court below in the subsequent course of the suit.

The only remaining question is, whether the judgment under appeal can be impeached on the ground that it directs the costs of the action up to that stage to be costs of succession. It is unnecessary for their Lordships to consider, whether it is in accordance with the practice of this Tribunal to allow an appeal which has failed on all other points to be supported as an appeal upon the question of costs; because they are of opinion, that in this case the objection cannot be maintained. The declaration prayed that the costs should be costs of succession of *Léonce Lagesse*, but, in case of contestation, should be paid by the contesting party. The words of the judgment are "costs of the action hitherto to be costs of succession." Mr. *Mackeson's* objection was founded on the 1016th Article of the Code, which says:—"*Les frais de la demande en délivrance seront à la charge de la succession, sans néanmoins, qu'il puisse en résulter de réduction de la réserve legale.*" There is nothing in the words of the Decree from which it can be inferred with certainty that in the final administration of the estate the Court below will not apply this Article in its integrity. But even if it be intended to throw the costs upon the whole succession, including the reserve, their Lordships are not prepared to say that it exceeded its powers in doing so. *Demolombe*, in commenting on this Article of the Code (*Traité des Testaments, Liv.* iii., *Tit.* ii., ch. v., art. 519, vol. iv, p. 459), after stating as a general proposition, that the aggregate amount of the legacy and of the costs of the "*demande en délivrance*" must not exceed the disposable proportion of the estate, or break in upon the legal reserve, goes on to say:—"*Il n'en serait autrement qu'autant que l'héritier réservataire aurait élevé une prétention mal fondée; car, il devait être alors condamné aux dépens, lors même que sa réserve s'en trouverait entamée.*"

Again, what was in this case the contestation which has occasioned the chief part of the costs of this litigation? It was in effect a claim by the heirs entitled to a reserve to a legacy in addition to their legal reserve; a claim in the character of legatees, not of heirs protecting the succession, which they have failed to establish. It cannot be doubted that, in such a case,

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the Court below might have acted on the prayer of the declaration, and under the 130th Article of the *Code of Civil Procedure* have condemned the Appellant in costs. The decree, therefore, however to be construed, is in ease of the Appellant and of those whom she represents.

Their Lordships will humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss the appeal with costs.

Solicitors for the Appellant: *Valpy & Chaplin.*
Solicitors for the Respondents: *Kynaston & Gasquet.*

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THE LONDON CHARTERED BANK OF AUSTRALIA . . . . . } APPELLANT;

AND

WILLIAM GEORGE LEMPRIÈRE AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Separate estate of a Married Woman with power of appointment by Deed or Will—Debts of Married Woman—Banker's lien—Pleading—Fraud charged and not proved—Costs.

The property of a married woman, settled by an ante-nuptial Settlement for her separate use for life, with remainder as she should by Deed or Will appoint, with remainder in failure of appointment to her Executors or Administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire *corpus* in her for all purposes.

A., a Widow and the Administratrix of her deceased Husband (who had died intestate), and entitled to Dower as to his real estate, and to a third of his personal estate, being about to contract a second marriage, executed with her intended Husband a Settlement, whereby she settled the estate she was so possessed of and entitled to, to her sole and separate use, with power of appointment by Deed or Will, and with his consent gave a Letter instructing her Bankers to keep separate accounts, and to consider any private overdraft by her on her own account secured by the administrative deposits in their hands. At this time two sums of £6,000 and £8,000 were in deposit on such account, and subsequently various other sums were, from time to time, paid in by her to the same account, and placed at interest with the Bank, who

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* *Present*:—The LORD JUSTICE JAMES, SIR BARNES PEACOCK, The LORD JUSTICE MELLISH, and SIR MONTAGUE EDWARD SMITH.

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allowed her to overdraw her private account on the strength of the arrangement so made.

By her Will she executed the power of appointment reserved to her by the Settlement, and having at the time of her death overdrawn her private account to a considerable amount, the Bankers claimed, as against the parties interested under the Will, to retain the sums so paid into their hands, on account of the administrative account, and especially the sums of £6,000 and £8,000, so deposited with them, in payment of the sums due to them on account of the overdrafts made by her on her private account, and brought a suit in the Supreme Court of the Colony of *Victoria* to enforce such lien. The Supreme Court dismissed the suit:—

Held by the Judicial Committee, reversing such decision, that, whether or not the Bankers had notice of the Settlement (which fact was uncertain) the Letter of instruction to them by *A.* was a valid execution of the right reserved by her, as regarded the two sums of £6,000 and £8,000 then in their hands, and in the absence of fraud gave the Bankers a lien on those sums for any future overdraft that might be made in accordance with the terms of such Letter.

The *dictum* of Lord Justice *Turner* in the case of *Johnson* v. *Gallagher* (1) as to the liability of the separate estate of a married woman for debts contracted with reference to such estate, approved and adopted. The case of *Shattock* v. *Shattock* (2) dissented from.

If the relief sought by the Bill is based on fraud, the failure to prove it is fatal; but if by striking out of the Bill the charge of fraud there is sufficient equity stated and proved, and the charge of fraud is only subsidiary, it is a matter only affecting costs.

THIS appeal was brought from a decree of the Primary Judge in Equity of the Supreme Court of the Colony of *Victoria*, dismissing the Appellant's Bill, and also from a decree of the full Court on appeal dismissing an appeal from that decree with costs.

The question arising on the appeal was, whether the Appellant, by virtue of a Letter, dated the 4th of April, 1862, was entitled to a lien on the share of Mrs. *Aitkin*, deceased, in the estate of her first Husband, *Jeremiah George Ware*, late of *Koort Koort Nong* station, in the Colony of *Victoria*, and in particular on two sums of £8,000 and £6,000, deposited by her with the Appellant's Bank, notwithstanding a Settlement made on her second marriage, and her appointment by Will in exercise of a power in such settlement contained.

The Appellant's Bank was incorporated by Royal Charter, and carried on the business of banking in the Colony of *Victoria*.

The several Respondents were the Trustees of the Settlement made on Mrs. *Aitkin's* second marriage; *James William Manifold*

(1) 3 D. F. & J. 494. (2) Law Rep. 2 Eq. 182.

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Aitkin, her second Husband, and *William George Lemprière*, the Executors and Trustees of her Will; the children of Mrs. *Aitkin* by her second Husband; the legal personal representative of *Jeremiah George Ware* of the estate not administered by Mrs. *Aitkin*, the original Administratrix; the Receiver appointed in a suit of "*Ware* v. *Ware*" for the administration of *Jeremiah George Ware's* estate, instituted in the Supreme Court of the Colony of *Victoria*; the six children of Mrs. *Aitkin* by her first Husband; and the Trustees of the Settlement executed on the marriage of *Mary Hickling*, one of such children, with *Frederick James Hickling*, and which comprised her interest under her Mother's second marriage Settlement and Will. The Respondent, the *National Bank of Australasia*, was the Assignee of a legacy of £5,000 given to *James William Manifold Aitkin* by Mrs. *Aitkin's* Will, and the Official Assignee of *James William Manifold Aitkin*, whose estate was, on the 16th of May, 1870, placed under sequestration for the benefit of his Creditors, was also a Respondent.

The material facts of the case were these:—

J. G. Ware died intestate on the 22nd of October, 1859. His personal estate was of great value, and consisted chiefly of stations or runs, and stock and other chattels thereon, to one-third share of which *Anne Young Aitkin* was entitled as his Widow. He also owned other real estate, in which *Anne Young Aitkin* was entitled to dower.

On the 16th of November, 1859, Letters of administration of the personal estate of the Intestate were granted by the Supreme Court of the Colony of *Victoria* to his Widow, afterwards Mrs. *Aitkin*. In the month of March following a suit was instituted in that Court in its equitable jurisdiction by the Respondent, *J. G. Ware*, one of the children of Mrs. *Aitkin* by her first Husband, for the administration of the estate of the Intestate, which is still pending. By an Order made therein on the 14th of March, 1865, the Respondent, *Joseph Ware*, was appointed Receiver and Manager of the rents and profits of the real estate and stations of the Intestate.

During her widowhood, *Anne Young Ware* kept two accounts with the Appellant's Bank at the *Geelong* branch. One was a

private account, and was opened and kept simply in the name of *Anne Young Ware*, and the other was an administration account, and was opened and kept by her as Administratrix of the estate of the Intestate in the name of "*Anne Young Ware*, Administratrix."

On the 9th of March, 1860, *Anne Young Ware* authorized the Bank to honour cheques of her Son, the Respondent, *John Ware*, who was her Agent in the management of the Intestate's estate, drawn on her administration account.

On the 20th of March, 1862, *Anne Young Aitkin*, then *Anne Young Ware*, Widow, intermarried with the Respondent, *James William Manifold Aitkin*.

The share of *Anne Young Aitkin* in the personal estate of the Intestate had not been ascertained at the time of her second marriage, and it was not, in fact, ascertained until the Master in Equity made his general report in the suit of "*Ware* v. *Ware*," on the 20th of December, 1865, but all the debts of the Intestate had then been paid, and she was then to the knowledge of the Bank entitled to a large sum in respect of such share, and was also then entitled to a further sum for arrears of rent or income, in respect of her dower in the real estate, of which there had been no assignment.

In contemplation of such marriage there was executed a Settlement, dated the 19th of March, 1862. By this Settlement *Anne Young Aitkin*, with the privity and consent of *James William Manifold Aitkin*, assigned unto *William George Lemprière* and *William MacRobie* all her right and title to Dower in the real estate of the Intestate, and all income then or thereafter to become due to her in respect thereof, upon trust that *W. G. Lemprière* and *W. MacRobie*, or other the Trustees or Trustee for the time being of the Settlement, should during the life of *Anne Young Aitkin* pay to her, for her sole and separate use, but without power of anticipation, all moneys which might come to their hands under the assignment; and after the death of *Anne Young Aitkin*, as to all moneys which might have accrued or become due in respect of such Dower, and which might not have been received by the Trustees for the time being, upon trust for such persons and purposes as *Annie Young Aitkin* should, notwithstanding coverture,

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by Deed or Will appoint, and in default of appointment to her Executors or Administrators And by the same Indenture *Anne Young Aitkin* assigned unto *W. G. Lemprière* and *W. MacRobie* all her share of the personal estate of the Intestate, and of the income and profits thereof, upon trust that *W. G. Lemprière* and *W. MacRobie*, or other the Trustees for the time being, should out of any principal moneys which might come to their hands by virtue of the assignment last aforesaid, in the first place set apart the sum of £15,000. and invest the same as in the Indenture mentioned, and should pay, assign, and dispose of that sum, and the securities upon which the same might be invested, and the interest thereof, to such person or persons, upon such trusts, and for such purposes as *Anne Young Aitkin* should, notwithstanding coverture, by Deed or Will appoint. And in default of and until appointment, should during the joint lives of *Anne Young Aitkin* and *James William Manifold Aitkin* pay the interest to *Anne Young Aitkin* for her sole and separate use. And after the death of *Anne Young Aitkin* so much of the sum of £15,000, and securities, and the interest thereof, as should have been unappointed and undisposed of by her, were to remain, in case *James William Manifold Aitkin* were to survive her, in trust for her Executors and Administrators. And it was by the same Indenture declared, that the Trustees for the time being should stand possessed of the residue of the principal moneys which should come to their hands by virtue of the assignment, after setting apart the sum of £15,000, upon trust that they should invest such residue as thereby provided, and should during the joint lives of *Anne Young Aitkin* and *James William Manifold Aitkin* pay the income thereof, and of the securities upon which the same might be invested, unto *Anne Young Aitkin* for her sole and separate use, but without power of anticipation; and after the death of *Anne Young Aitkin* should stand possessed of the residue and securities, and the income thereof, in trust for the children of *Anne Young Aitkin*, then existing, or to be born thereafter, as she should by Deed or Will appoint, and in default of children, for such persons as she should in like manner appoint.

Shortly after the marriage, viz. on the 4th of April, 1862, Mr. and Mrs. *Aitkin* called at the *Geelong* branch of the Appellant's

Bank, and had an interview with *John Galletly*, the Manager there. There was conflicting evidence as to what took place at this interview, and especially on the question, whether any allusion was made to the marriage Settlement. It was admitted, on the one hand, that *Galletly* did not inquire, whether there was any Settlement; and on the other hand, that Mrs. *Aitkin* never mentioned that there was one; and the Appellant's case was, that it must be concluded from the evidence that no allusion thereto was in fact made by Mrs. *Aitkin*, by whom alone it was alleged by the Respondents to have been made. It was in evidence, that at this interview Mrs. *Aitkin* stated, that she had called with reference to her accounts, and in answer to an inquiry made by *Galletly*, said that she did not intend making any change. She added, that she would require the same facilities for getting money from the administration account as she had previously had, and might require to overdraw her private account on the security of the administration account, and that she wished *John Ware* to have the same authority as to drawing cheques as before. *Galletly* said, that it was only necessary to change the title of the accounts from *Ware* to *Aitkin*, and he drew up the following Letter, which he stated was intended to express her wishes. She signed the Letter, and on *Galletly* mentioning that Mr. *Aitkin's* consent was required, he also signed it.

"*Geelong*, 4th April, 1862.

"The Manager, *London Chartered Bank, Geelong.*

"Dear Sir,—Herewith I send you two cheques, amounting to £1,363. 3*s.* 7*d.* and £4,434. 18*s.* 7*d.*, drawn by me on my private account and administration account, and hereby request you to transfer the amount to accounts respectively to be opened in your Bank in the name of '*A. Y. Aitkin*' and '*A. Y Aitkin*, Administratrix.' Any cheques outstanding, or any Bills drawn, accepted, or indorsed '*A. Y. Ware*,' or '*A. Y. Ware*, Administratrix,' to be placed to the new accounts respectively. And you will consider any private overdraft of mine secured by my administration deposits in your hands, and please to recognise Mr. *John Ware's* signature as formerly on the administration account.

"I am, yours truly,

"I consent. *James M. Aitkin.* "*A. Y. Aitkin.*

"*John Galletly*, Witness."

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The sums of £1,363. 3*s.* 7*d.* and £4,434. 18*s.* 7*d.* mentioned in this Letter were at the date thereof standing to the credit of the private and administration accounts respectively, and were thereupon transferred to new accounts opened in accordance with the request contained in the above Letter. *Anne Young Aitkin* continued, with her Husband's consent, to act on the new accounts thus opened with the Bank. On the 20th of October, 1863, she transferred £8,000, and on the 3rd of March, 1864, she transferred £6,000 from the administration account to a deposit account at interest, and these sums remained so deposited until her death.

Acting on the arrangement embodied in the Letter of the 4th of April, 1860, Mrs. *Aitkin* was permitted to overdraw her private account to a large amount. At the time of her death there was due in respect of such overdraft, including interest at the current rate charged by the Bank, according to the usual course of dealing, the sum of £13,438. 2*s.* 8*d.* It was to this sum and subsequent interest that the Appellant's claim referred.

Mrs. *Aitkin* died on the 19th of June, 1867, having by her Will, dated the 3rd of October, 1864, appointed the Respondents *J. W. Manifold Aitkin*, *W. G. Lemprière*, and *W. MacRobie*, Trustees and Executors thereof, and she further appointed that all moneys which might have accrued in respect of her Dower in the real estate of the aforesaid Intestate, and might not have been received in her lifetime, should upon her death be paid to and held by the Trustees of her Will upon the same trusts as were thereinafter declared concerning the sum of £15,000; and as to this sum she gave £5,000, part thereof, to her Husband, the Respondent *Aitkin*, and gave the rest upon trusts for her second Son, *John Ware* the younger, and in certain events for her other children, and by the Will Mrs. *Aitkin* exercised the appointment reserved to her by the Settlement over the residue of the moneys comprised therein, and appointed the same upon certain trusts for her children.

By a Deed, dated the 20th of March, 1868, the Respondent, *Aitkin*, assigned his legacy of £5,000 to the Respondent, the *National Bank of Australasia*, by way of security for a debt due from him to that Bank, and interest.

On the death of *Anne Young Aitkin* the Appellant claimed to be entitled to be paid the principal moneys and interest due on

the overdraft of her private account, out of her share in the personal estate and her Dower in the real estate of her first Husband, and out of the sums of £8,000 and £6,000 so deposited as aforesaid, and the interest thereon. This claim was disputed by the persons interested under the Settlement made on Mrs. *Aitkin's* second marriage, and also by *Joseph Ware*, as the Receiver and Manager in the suit of "*Ware* v. *Ware*," and by *John Ware*, as the legal personal representative of *Jeremiah George Ware*.

The Appellant thereupon filed a Bill in Equity for the purpose of enforcing the claim. To this Bill, which was amended, all the Respondents were made Defendants.

The Bill set forth the facts before stated, and, regarding the interview at the Bank with Mr. and Mrs. *Aitkin* on the 4th of April, 1862, already stated, alleged that *Anne Young Aitkin* and the Defendant *Aitkin*, her Husband, did not, either of them, on the 4th day of April, 1862, or at any time, disclose to the Manager the existence of the Indenture of Settlement of the 19th of March, 1862, but, for the purpose of obtaining such overdraft as aforesaid, concealed from him the fact of such Settlement having been made; and the Manager was not, nor was the Plaintiff, aware during the lifetime of *Anne Young Aitkin* that any Settlement had been made on her marriage with the Defendant, *James William Manifold Aitkin*, but believed that the whole of her distributive share in the personal estate of the Intestate and her Dower was at the absolute disposal of herself and her Husband, and that if the existence of the Settlement had been known to the Manager or to the Plaintiff, the arrangement made on the 4th day of April, 1862, would not have been entered into, and *Anne Young Aitkin* would not have been permitted to overdraw her private account; and the Plaintiff submitted that, under the circumstances, the concealment of the Settlement was a fraud upon the Plaintiff, and that the distributive share of *Anne Young Aitkin* (formerly *Ware*) in the personal estate of the Intestate, and all moneys which might be payable in respect of her Dower in his real estate, or any part thereof, were liable to make good to the Plaintiff, in priority to any claim of the parties interested under the Settlement or Will, the sum so due to the Plaintiff, with interest as aforesaid in

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respect of the overdraft; and that until such sum and interest was fully paid the Plaintiff had a lien upon, and was entitled to retain, the deposits of £8,000 and £6,000 as security for the same; and further alleged that the Defendants insisted, that the Defendant, *John Ware*, as such Administrator, or the Defendant, *Joseph Ware*, as the Receiver appointed in the suit, was entitled to the deposits of £8,000 and £6,000, and accruing interest thereon, and the Defendants, *John Ware* and *Joseph Ware* had demanded the same from the Plaintiff, and threatened and intended to bring an action-at-law against the Plaintiff therein for the recovery thereof, although the Defendants were well aware of the arrangement made between the Plaintiff by its Manager and *Anne Young Aitkin* and her Husband for the overdraft, and never disclosed the existence of the Settlement to the Plaintiff; and the Bill prayed, that it might be declared, that the share to which *Anne Young Aitkin* (formerly *Ware*) was entitled as Widow of the Intestate in his personal estate, and the moneys payable in respect of her Dower in his real estate, were liable to make good the sum due to the Plaintiff, with interest, in respect of the overdraft, and that until such overdraft was fully paid that the Plaintiff had a lien upon, and was entitled to retain, the deposits of £8,000 and £6,000 as security for the same; and for an account of what was due to the Plaintiff in respect of the overdraft. That the Defendant, *John Ware*, in case he should admit assets for that purpose, might be decreed to pay to the Plaintiff what should be found due on taking such account; and that in case he should not admit assets, then that the share of *Anne Young Aitkin* in the estate of the Intestate might be ascertained, and the personal estate of the Intestate, so far as might be necessary for that purpose, administered under the direction of the Court; and for an account of the moneys payable in respect of the Dower of *Anne Young Aitkin* in the real estate of the Intestate, or any part thereof, and that the share and moneys might be applied in payment of what should be so found due to the Plaintiff; and that the Defendants, *Lemprière*, *Murray*, and *Aitkin* might be severally restrained by injunction from receiving or applying upon the trusts of the Settlement or Will any of the moneys or property

assigned by the Indenture of Settlement; and that they might be directed to apply the same in or towards payment of the Plaintiff's claim; and that the Defendants, *John Ware* and *Joseph Ware*, might be restrained from bringing any action-at-law for recovery of such deposits.

By the answers the main defence raised by the Defendants was, that the Settlement made on Mrs. *Aitkin's* second marriage was disclosed to *Galletly* in the course of conversation at the interview of the 4th of April, 1862, and it was in effect insisted by the Defendants, that the Appellant's claim was defeated by the Settlement, and that the persons interested thereunder and under Mrs. *Aitkin's* Will took her share in her first Husband's estate, discharged from all lien claimed on behalf of the Appellant.

The suit was heard before Mr. Justice *Molesworth*, one of the Primary Judges in Equity of the Supreme Court of the Colony of *Victoria*, on the 14th, 22nd, and 25th of November, 1870. *Galletly* and *Nicol* were examined *vivâ voce* on behalf of the Appellant and cross-examined on behalf of the Respondents. *James William Manifold Aitkin* and *John Ware* were also examined *vivâ voce* on behalf of the Respondents and cross-examined on behalf of the Appellant.

Mr. Justice *Molesworth*, on the 12th of December, 1870, gave judgment dismissing the Appellant's Bill with costs.

The case was then taken on appeal to the Supreme Court of the Colony of *Victoria*, sitting in Banco, on the 23rd of December, 1870. The appeal was dismissed with costs. The reasons of the Chief Justice, Sir *William F. Stawell*, and the other Judges, for the judgment of the Court of appeal were, first, that there was no evidence of concealment, or intention to conceal, the Settlement on the part of *Anne Young Aitkin* or her Husband; secondly, that it was the duty of the Manager to have made inquiries as to the existence of any such Settlement.

From this judgment the present appeal was brought.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the Appellant:—

The question to be decided in this appeal is, whether the Appel-

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lant is not, under the circumstances, and by virtue of the Letter of the 4th of April, 1862, entitled to a lien on the share of the late Mrs. *Aitkin* in the estate of her first Husband, *Ware;* more especially in the two sums of £8,000 and £6,000, deposited by her with the Bank, notwithstanding the Settlement executed on her second marriage with *Aitkin*, and the appointment by her by Will, in the exercise of the power contained in such Deed of Settlement. We maintain, that the Bank had no notice of the Settlement, and the exercise of the power by Mrs. *Aitkin* reserved to her in it was a fraud on the Appellant, and could not affect his lien on the funds deposited with him. The true conclusion, from the evidence, is, that the existence of the Settlement, if not intentionally concealed from the Appellant, was at least not disclosed to him, as it ought to have been, on the 4th of April, 1862. It was no part of the duty of the Appellant to make inquiries regarding the execution of a Settlement; and it appears that during Mrs. *Aitkin's* life he had no knowledge of the existence of such. The exercise of a power, therefore, under it, over funds on which the Appellant had a clear lien for his Customer's overdraughts, was a fraud on him and cannot be supported: *Sugden* on Powers, pp. 331 n. (*l*), 474, 476 [8th Ed.]. The power given was to be executed by Deed or Will; if executed by Deed, notice must have been given to the Bank; the concealment, therefore, of the Settlement from them was a fraud, and the information of that fact improperly withheld: *Archbold* v. *The Commissioners of Charitable Bequests for Ireland* (1); *Bromley* v. *Smith* (2); *Vaughan* v. *Vanderstegen* (3). All the cases on this point illustrate the same hypothesis of fraud to be imputed from concealment. In *Johnson* v. *Gallagher* (4) the liability of the separate estate of a married woman for her individual debts was much discussed, and though the Lord Justices *Knight Bruce* and *Turner* differed in the reasons which led them to the same conclusion, yet the decision in that case is strongly in our favour.

But should the Settlement be held good against the Appellant's lien, yet Mrs. *Aitkin* having exercised the power of appointment by Will, as reserved to her, so much of the several sums of £8,000,

(1) 2 H. L. C. 440–459.
(2) 26 Beav. 644.
(3) 2 Drew. 165, 363.
(4) 3 D. F. & J. 494.

5 Jur. N.S. 833.

7 Jur. N.S. 274.

and £6,000, as formed any part of her share of her late Husband's estate, or was appointed in favour of her second Husband, was liable, and ought to have been applied towards the satisfaction of the debt due to the Bank, on the security of the Letter of the 4th of April, 1862.

Even if fraud was not proved, the other allegations being proved are grounds for a Decree: *Archbold* v. *The Commissioners of Charitable Bequests for Ireland* (1); *Hickson* v. *Lombard* (2); *Espey* v. *Lake* (3); *Parr* v. *Jewell* (4).

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, for the Respondents, *John Ware*, and others.

Mr. *Cotton*, Q.C., and Mr. *Lindley*, Q.C., for the Respondents, *Lemprière*, and others; and

Mr. *Fry*, Q.C., and Mr. *C. H. Russell*, for the *National Bank of Australia*.

Their Lordships refused to hear more than two Counsel for the Respondents, accordingly,

Sir *R. Baggallay*, Q.C., and Mr. *Cotton*, Q.C., argued the case for the whole of the Respondents:—

Neither Mrs. *Aitkin* nor her Husband gave, in the interview with the Manager of the Bank, or intended to give, any security whatever for any overdraft of her private account. The Letter of the 4th of April, 1862, cannot be considered an execution of the power given her by the Settlement, of which Settlement the Bank, if they had not notice, could have ascertained, and it did not give the Bank a lien or charge on Mrs. *Aitkin's* one-third share of the intestate's estate, nor on the funds comprised in the Settlement, over which she had a general power of appointment. Mrs. *Aitkin's* liability, if any, is confined to her separate estate, and she could not enter into any other contract except as to it: *Shattock* v. *Shattock* (5); *Vaughan* v. *Vanderstegen* (6); *Hobday* v. *Peters* (7); *Johnson* v. *Gallagher* (8);

(1) 2 H. L. C. 440.
(2) Law Rep. 1 H. L. 324.
(3) 10 Hare, 260.
(4) 1 K. & J. 671.
(5) Law Rep. 2 Eq. 182.
(6) 2 Drew. 165, 363.
(7) 28 Beav. 354.
(8) 3 D. F. & J. 494.

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Heatley v. *Thomas* (1); *Stockett* v. *Wray* (2); *Hulme* v. *Tenant* (3). Secondly, the relief sought by the Bill is on the ground of fraud, and the allegations on that head are not proved. The other allegations of the Bill alleging an informal execution of a power shew no ground for equitable relief, and, therefore, the doctrine of equitable relief does not apply.

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Their Lordships' judgment was reserved, and was now delivered by

THE LORD JUSTICE JAMES:—

The Plaintiff in this case had certain dealings and transactions with one *Anne Young Aitkin* and her Husband out of which the present claim arises. She was the Widow and Administratrix of one *Jeremiah George Ware*, deceased, who had died (as far back as October, 1859), Intestate, possessed of property, real and personal, to a very large amount.

A suit was instituted in the Supreme Court of *Victoria* for the purpose of administering that estate, and, in the course of that suit, a Receiver and Manager of the rents and profits of the real estate and stations of the Intestate was appointed, but the administration of the personal estate by the Administratrix was not otherwise interfered with by the Court.

Mrs. *Aitkin*, then Mrs. *Ware*, employed the Plaintiff as her Bankers, and had two accounts with them: one her private account; the other her administration account, opened with her as *Anne Ware*, Administratrix. The Receiver kept his account with the same Bank.

In March, 1862, she intermarried with Mr. *Aitkin*. Shortly after her marriage, she and her Husband called at the Bank, and at their request the two accounts were transferred to her by her new name, and on that occasion she signed a Letter as follows:—[His Lordship read the Letter, *ante*, p. 577, and proceeded:—] And the Husband signed his name to the words "I consent" written thereunder.

Afterwards, and up to the time of Mrs. *Aitkin's* death in June,

(1) 15 Ves. 596. (2) 4 Bro. C. C. 483.
(3) 1 Bro. C. C. 16; S. C. 2 Dick. 560; and see 1 W. & T. L. C. 481 [4th Ed.]

1867, very large sums were drawn out by her on her private account; and the same was overdrawn at that time to the extent of £13,438. But during the same period very large sums were paid in to the Administratrix account, which were, from time to time, placed on deposit at interest with the Bank. Amongst the sums so deposited were two sums of £6,000 and £8,000, which are especially the subject of this suit. After the death of Mrs. *Aitkin* an Order was made for the transfer of the balance in the hands of the Bank, belonging to the estate to the credit of the cause, and it is alleged, and appears to be the fact, that, in the first instance, the Manager of the Bank was minded to obey such Order to its full extent, without setting up any claim to retain the deposits of £8,000 and £6,000, and "acted so as to make the Receiver suppose that those sums were transferred as well as the other moneys in their hands, but before actual transfer the Manager placed those two sums to a suspense account, insisting that he had a right to apply them to the overdraft on the private account."

Nothing material however appears to turn on this vacillation of purpose or on this conduct of the Manager. The two sums had actually been placed on deposit by Mrs. *Aitkin* herself before the appointment of the Receiver; the moneys were still in the hands of the Bank, and nothing was actually done to affect the right (if the Bank had the right) so to retain and apply those deposits. *Primâ facie* the Bank had that right under the Letter of Mrs. *Aitkin* concurred in by her Husband. Whatever moneys were deposited by her after that Letter were paid by her and received by the Bank on the conditions contained in her Letter, and the Bank could not have been called on to pay over what they so received on the Administratrix account until the private account had been first discharged, unless by some person having some better equity of which the Bank had notice. Of course the Bank had notice of one such equity from the very nature of the case, viz., that the moneys so paid in were assets of the Intestate's estate, and might, therefore, be followed, if necessary, by the Creditors of the deceased, and by the other next of kin beneficially entitled. But no such claim has been made by either Creditors

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or next of kin as such, and it is abundantly clear and is admitted that there are other assets forthcoming far more than sufficient to answer all their claims, and that the overdrafts of Mrs. *Aitkin* are much less than her distributive share of the net residue. It would appear clear, therefore, that the Bank had so far the right of retainer claimed by them.

It appears, however, that on the occasion of her marriage, and before the date of her Letter, she had by marriage Settlement settled her share of the residuary estate upon trusts under which several of the Respondents claimed to have a preferable right to that share, including all her right and interest to and in the deposits of £8,000 and £6,000.

But, unless the Bank had notice of that Settlement, they cannot be affected thereby so as to deprive them of their right to retain moneys deposited with them under the circumstances above stated. There is a contest of fact as to whether, the Bank had or had not such notice, the Manager deposing that he never heard of it, the Husband, on the other hand, deposing that it was distinctly mentioned to him at the interview when the Letter was signed, and with reference to the arrangements then made. In this conflict of oath against oath, it would be impossible to hold that the fact of notice (the *onus* of proving which lies on the Respondents) had been made out, and the probabilities arising from the surrounding circumstances and the transaction itself are in favour of the Manager's statement and not the Husband's. And this might be sufficient to dispose of the case so far as regards the right to the £14,000 now retained.

But it is not satisfactory to dispose of a case merely on the balance of such conflicting testimony, especially as in the arguments in the Supreme Court of the Colony and here the case of the Bank has been very much put on their rights derived under the Settlement itself.

By that Settlement it was agreed—

"That, in pursuance of the said agreement, and in consideration of the said intended marriage, and of five shillings, she, the said *Anne Young Ware.* with the privity and consent of the said *James William Manifold Aitkin,* assigned to the Trustees the dower and estate, or right and title to Dower, which the said *Anne*

Young Ware hath or is or may be entitled to, or which may hereafter be assigned to her, in and out of all and singular or any part of the real estate of which the said *Jeremiah George Ware*, deceased, was seised, or to which he was beneficially entitled at the time of his decease: And all income or share of rental or produce which is now due, or which may hereafter become due and payable, or be assigned to the said *Anne Young Ware*, as or in respect of her said Dower or right of Dower: And all the estate, right, title, and interest of the said *Anne Young Ware* into and out of the same real estate, and all benefit and advantage thereof, To have, hold, receive, and take the said Dower, estate, or right and title of or to Dower and income, share of rental, and moneys in trust for the said *Anne Young Ware*, her Executors, Administrators, and Assigns, until the said intended marriage: And from and after the solemnization thereof, upon trust, during the life of the said *Anne Young Ware*, to pay all moneys, rents or income which may come to the hands of such Trustees or Trustee under or in respect of the said conveyance and assignment of Dower or estate, right or title of dower hereinbefore contained unto the said *Anne Young Ware*, for her sole and separate use and benefit, exclusively and independently of her Husband for the time being, and without being in any manner subject to his debts, control, interference, or engagements: And the receipts of the said *Anne Young Ware* alone shall, notwithstanding her coverture, be sufficient discharge for the said moneys, rents, or income, and she shall not have power to dispose or deprive herself of the benefit thereof by way of anticipation: And upon the death of the said *Anne Young Ware*, all moneys, rents or income which may have accrued or become due or payable in respect of such dower of her, the said *Anne Young Ware*, as aforesaid, and which may not have been received in her lifetime by the Trustees or Trustee for the time being under these presents, shall be held by them, upon trust for such person or persons, in such manner and for such purposes, as the said *Anne Young Ware* shall, notwithstanding coverture, by any Deed or Deeds, with or without power of revocation and new appointment, or by Will or Codicil, from time to time appoint: And in default of and subject to every or any such appointment as aforesaid, in trust for the

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Executors or Administrators of the said *Anne Young Ware* absolutely as part of her personal estate: And *Anne Young Ware*, with the privity and consent of the said *James William Manifold Aitkin*, assigned all that the one equal third part or share, and all other the share and interest to which as the Widow of the said *Jeremiah George Ware*, deceased, the said *Anne Young Ware* is entitled out of, in, and to all singular the personal estate of the said *Jeremiah George Ware*, howsoever constituted or invested, and of and in the moneys which have arisen, or which may arise, by the sale and conversion into money of the said personal estate of the said *Jeremiah George Ware*, deceased, or any part thereof; and the corresponding share to which the said *Anne Young Ware* is entitled, or the income produced by such personal estate in the meantime, and until the same shall be sold and converted into money; and also the share to which the said *Anne Young Ware* is or may be entitled, of and in the net profits arising from the use and employment of the said personal estate since the decease of the said *Jeremiah George Ware*, to hold the said parts or shares, and premises lastly hereinbefore assigned unto the said *William George Lemprière* and *William MacRobie*, their Executors, Administrators, and assigns, in trust for the said *Anne Young Ware*, her Executors, Administrators, and Assigns, until the said intended marriage; and after the solemnization thereof, upon trust that the said *William George Lemprière* and *William MacRobie* and other the Trustees and Trustee for the time being acting under these presents, shall, with and out of any principal moneys which may come to their or his hands or hand by virtue of the assignment lastly hereinbefore contained, in the first place appropriate and set apart the sum of fifteen thousand pounds, and do and shall pay, transfer, assign, or otherwise dispose of the said sum of fifteen thousand pounds, or any part or parts thereof, and the stocks, funds, and securities in or upon which the same sum or any part thereof may, for the time being, be invested, and the dividends, interest, and annual produce thereof, or any part of the same respectively, to such person or persons, upon such trusts, for such intents and purposes, and in such manner as the said *Anne Young Ware*, notwithstanding her said intended coverture, by any Deed or Deeds, with or without power of revocation and new

appointment, or by Will or Codicil, shall, from time to time, direct or appoint: And in default of and until such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend to, and shall during the joint lives of the said *Anne Young Ware* and *James William Manifold Aitkin* pay, apply, and dispose of the said interest, dividends, and annual produce of the said sum of fifteen thousand pounds, or of the stocks, funds, or securities in or upon which the same may be invested, into the proper hands of her, the said *Anne Young Ware*, for her own sole and separate use and benefit, exclusively and independently of her said intended Husband, and without being in any wise subject to his debts, control, interference, or engagements; and from and immediately after the decease of either of them the said *Anne Young Ware* and *James William Manifold Aitkin*, the said sum of fifteen thousand pounds, and the stocks, funds, and securities upon which the same sum or any part thereof shall for the time being be invested, and the dividends, interest, and annual produce thereof respectively as shall have been unappointed and undisposed of by the said *Anne Young Ware* shall remain and be upon the trusts following, that is to say, if the said *Anne Young Ware* shall survive the said *James William Manifold Aitkin*, in trust for the said *Anne Young Ware*, her Executors, Administrators, and Assigns, for her and their absolute use and benefit; but if the said *James William Manifold Aitkin* should survive the said *Anne Young Ware*, then in trust for the Executors and Administrators of the said *Anne Young Ware* as part of her personal estate."

It is admitted by all the adult Defendants, that Mrs. *Aitkin's* share is much more than the £15,000 mentioned in the Settlement, and as between the Plaintiff and the infant Defendant the question raised and argued is, which has the better right, the Bank as Creditors, or the infant as appointee under Mrs. *Aitkin's* Will, she having by her Will appointed the same between her Husband and her children.

On the part of the Bank it was contended that, whether the Settlement was known to both parties, or was only known to the Husband and Wife, the Letter must be considered to have been written honestly and with the intention of binding the deposits to

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the extent of any interest which it was then in her power to charge at law or in equity. The words in that Letter "secured by my administration deposits in your hands," must have the same construction and effect as if the Letter had gone on to say, "so far as I have power to charge them." She had, at that moment, power, by Deed or Will, to charge them to the full extent of the amount of her dower, and of the £15,000, and it is contended, and their Lordships are of opinion, that the Letter being in favour of Purchasers for value is a sufficient and substantial, though informal, execution of the Lady's power under the marriage Settlement, and as to every thing which she had power to dispose of by Deed thereunder, and so that the claim of the Bank would be paramount to the claims of any persons under her Will. But it was very much pressed by the Counsel for the Respondents that no such case was made by the Bill, and no such issue raised as that of the right to have an informal execution of a power supplied in equity. The facts, however, being all stated, the Letter of charge, the Settlement, and the Will, the fact that the particular head of equity under which the Plaintiff's claim is not distinctly charged does not appear to raise any very serious difficulty.

The issue is not one of fact; it is a conclusion of equity.

But, as it is true, that this view of the case is not in terms presented by the Bill, and does not appear to have been considered in the Colony, their Lordships have thought it right to consider the questions which appear to have been argued and disposed of in the Supreme Court, and which may, in fact, have a material bearing on the rights of the Defendants *inter se*.

The Bank made and make the following case:—

We are, they say, Creditors of a married lady having a separate estate, and a power for our purpose equivalent to a separate estate; and the Lady having exercised that power by Will in favour of volunteers, we the Bank are entitled to be paid our debts out of the moneys appointed in priority to the volunteers.

The Plaintiffs rely on the law as laid down by the Lord Justice *Turner* in *Johnson* v. *Gallagher* (1). He there says that,

"Since the case of *Jones* v. *Harris* (2) there is not, so far as I am aware, any case opposed in any degree to the doctrine of the

(1) 3 D. F. & J. 513. (2) 9 Ves. 493.

separate estate being liable for general engagements, except the case of *Aguilar* v. *Aguilar* (1), which followed *Jones* v. *Harris* (2), and the *dicta* of Sir *John Leach* in *Greatley* v. *Noble* (3), and *Stuart* v. *Lord Kirkwall* (4); and, on the contrary, the cases of *Murray* v. *Barlee* (5), *Owens* v. *Dickson* (6), *Burke* v. *Tuite* (7), *Vaughan* v. *Vanderstegen* (8), and *Wright* v. *Chard* (9), contain very decisive *dicta* in favour of such liability. The weight of authority, therefore, seems to me to be in favour of the liability. I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme sole*, is also in favour of it; and upon the whole, therefore, I have come to the conclusion that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the *Statute of Frauds* may interfere where the separate property is real estate. I am not prepared, however, to go the length of saying that the separate estate will, in all cases, be affected by a mere general engagement. The cases of *Jones* v. *Harris* and *Aguilar* v. *Aguilar* shew that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity, would not affect it. It seems to follow that to affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her Husband, might not, as I apprehend, affect it in the case of a married woman living with her Husband. What might bind the separate estate if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement,' when applied to a married woman, seems to import something more than mere contract, for neither in Law nor in Equity can a married woman be bound by contract merely: *Aylett* v. *Ashton* (10). According to the best opinion which

(1) 5 Madd. 414.
(2) 9 Ves. 493.
(3) 3 Madd. 79.
(4) Ibid. 387.
(5) 3 M. & K. 209.
(6) Cr. & P. 48.
(7) 19 Ir. L. Rep. (Eq.) 467.
(8) 2 Drew. 165, 289, 263, 408.
(9) 4 Drew. 673. 5 Jun. Ch. S. 1854.
(10) 1 My. & Cr. 165.

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I can form of a question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so or not is a question to be judged of by this Court upon all the circumstances of the case. . . . . The separate estates of married women being thus far bound by their debts, obligations, and engagements, it has next become a question how far those debts, obligations, and engagements affect the *corpus* of the property where the married woman has a limited interest only, as, for instance, a life estate with a power of appointment. The cases on this subject may, as it seems to me, well be classed under three heads; first, where the power of appointment has been general, by deed or writing, or by will; secondly, where it has been by will only, and the power has been exercised; and, thirdly, where there has been a limitation in default of appointment, and the power has not been exercised. In cases falling under the third class there cannot, as it seems to me, be any reasonable doubt that the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment, and the case of *Nail* v. *Punter* (1) impliedly decides that point. In cases falling under the second class, where the power of appointment is by Will only, and has been exercised, but not for creditors, the authorities do not appear to me to be consistent. In *Norton* v. *Turvill* (2), as explained in *Sockett* v. *Wray* (3), the exercise of the power by the will of the married woman seems to have been held to let in a bond-creditor against the appointees under the will; and in *Hughes* v. *Wells* (4), I seem to have intimated that this might be the effect of the exercise of the power, as in other cases of the exercise of the general power of appointment by will, and certainly not upon the ground that power is property. But the Vice-Chancellor *Kindersley*, in whose judgment I have quite as much confidence as in my own, seems to have dissented from *Hughes* v. *Wells* in the case of *Vaughan* v. *Vanderstegen* (5), and I observe that Sir *William Grant* has treated the point as doubtful

(1) 5 Sim. 555.
(2) 2 P. Wms. 144.
(3) 4 Bro. C. C. 483.
(4) 9 Hare, 749.
(5) 2 Drew. 165.

in *Heatley* v. *Thomas* (1). I say no more, therefore, upon this point than that it may be considered as open. But in cases falling under the first class, where the power of appointment has been by Deed, or writing, or Will, the Courts have certainly held the *corpus* of the property to be subject to the debts and engagements of the married woman."

It is said, indeed, that the Lord Justice *Knight Bruce* did not concur with his colleague, and that Lord *St. Leonards* has expressed an opinion, that the Lord Justice *Knight Bruce's* view was the more correct. It will be observed, however, that the point of difference was as to whether a general engagement could create the obligation—and not at all as to the second point, as to how far the obligation, if it exists, binds the *corpus* of property subject to a power of appointment in the married woman.

The term "general engagement" is an ambiguous and misleading one. If it is meant merely to say, that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate, *e.g.*, for buying or selling, or letting or hiring, a House, do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense, and to that extent, the proposition that her separate estate is not liable to her general engagements is quite accurate. But that does not affect the rule as laid down by Lord Justice *Turner* as to general engagements, as to which it appears that they were made with reference to and upon the faith or credit of the separate estate. It will be useful to refer to Lord *Langdale's* expressions, in *Tullett* v. *Armstrong* (2), quoted by the Lord Justice *Turner* in *Johnson* v. *Gallagher* (3):

"It is perfectly clear, that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a Bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one, on her part that her separate estate, which would be the only means of satisfying the obligation into

(1) 15 Ves. 596. (2) 4 Beav. 319. (3) 3 D. F. & J. 515.

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which she entered, should be bound. Again, I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shews an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act" (1).

It would be very inconvenient that a married woman with a large separate property should not be able to employ a Solicitor, or a Surveyor, or a Builder, or Tradesman, or hire Labourers or servants, and very unjust, if she did, that they should have no remedy against such separate property.

It is true, that in *Shattock* v. *Shattock* (2) the Master of the Rolls expressly overruled the judgment of the Lord Justice *Turner*, and held, that even a promissory note given by a married woman living separate and apart from her Husband, and having property settled to her separate use for life, with a power to appoint the same by Deed or Will, and appointing it by Will, was not a debt payable out of the property so appointed. In that judgment he bases his dissent from the Lord Justice *Turner* on the ground, that the authorities cited by the latter do not warrant his conclusion.

Their Lordships are not able to concur in that view of the authorities, and have arrived at the conclusion, that Lord Justice *Turner's* judgment is expressed with his usual accuracy.

One of the cases, *Heatley* v. *Thomas* (3), when carefully examined, is a direct authority for the Lord Justice's proposition. There, a Bond creditor of the married woman sought payment out of property appointed by her Will. A doubt was raised in that case on the true construction of the Settlement, as to whether it did in fact give her a power of disposal by Deed or otherwise *inter vivos* as well as by Will, and that doubt being resolved in the affirmative, the Plaintiff obtained the decree sought for by him. Sir *William Grant's* observations are these:—

"The question is, whether this was separate property to all intents and purposes. In *Sockett* v. *Wray* (4), Lord *Alvanley* did not consider a married woman who had only a power of appointment by

(1) 3 D. F. & J. 515.
(2) Law Rep. 2 Eq. 182.
(3) 15 Ves. 596.
(4) 4 Bro. C. C. 483.

Will, as having separate property; distinguishing that case from *Norton* v. *Turvill* (1), where the creditor was allowed to resort to the separate property after the death of the wife, as she had a power of appointing either by Deed or Will. Upon the question in *Sockett* v. *Wray* (2), whether the wife could give the property to her Husband, Lord *Alvanley* held that she could not; that she could not affect it in any way but by a revocable instrument; and the Bond was an instrument not revocable. If this was absolute separate property in Mrs. *Johnson,* upon the Plaintiff's construction of the Deed, that takes it out of the case of *Sockett* v. *Wray* (2), and brings it to that of *Hulme* v. *Tenant* (3)."

In that case it is obvious, that Sir *William Grant* considered that property settled to a married woman's separate use for life, with power to dispose of it by Deed or Will, was, in effect, separate property. That case was in one respect a strong one, as there was no gift over except in the event of her dying in her Husband's life-time. She survived him, and, therefore, irrespective of the settlement, became again possessed of the property in her original right; so that upon the death of her Husband the property stood settled to herself for life, remainder as she should by Deed or Will appoint, remainder to herself absolutely. But having property over which at the time of making the Bond, she had absolute power of disposition notwithstanding her coverture, the Bond by which, notwithstanding her coverture, she had bound herself, was decreed to be satisfied out of it.

In the present case it is to be noted, that the gift is to the married woman for her separate use for life, with remainder, as she should, notwithstanding her coverture, by Deed or Will appoint, with remainder to her Executors or Administrators. Their Lordships are satisfied, that on the weight of authority and on principle they ought to treat this as what in common sense, and to common apprehension, it would be, an absolute gift to the sole and separate use of the Lady. The words are an expansion and expression of what would be implied in the word "sole and separate use;" and they conceive themselves at liberty to hold that such a form of gift to a married woman, without any restraint

(1) 2 P. Wms. 144. (2) 4 Bro. C. C. 483.
(3) 1 Bro. C. C. 16.

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on anticipation, vests, in equity, the entire *corpus* in her for all purposes, as fully as a similar gift to a man would vest it in him.

In the Supreme Court of *Victoria* the question appears to have been discussed and determined mainly on the applicability or non-applicability of the case of *Vaughan* v. *Vanderstegen* (1), which it is necessary, therefore, to consider. In that case the married woman had only power to appoint by Will. The Vice-Chancellor held, that a Creditor was not entitled to be paid out of property appointed by such Will, but on a second hearing held, that where a fraud had been practised on the Creditor, he was so entitled. His reasoning was shortly this: the fraud created an equitable demand which would have been enforced against any property of the married woman, and that being so, it would, like a man's debt, be payable not only out of her own assets, but in aid of them out of any property which she had a general power to appoint, and had actually appointed.

It is not easy to see on what principle the fraud could alter the nature of the property subject to appointment or affect the appointees. It is easy to see how fraud might make that a debt to which the married woman would be in equity liable notwithstanding her coverture, and that there being such a liability or debt, equity would deal with any property to which she was, notwithstanding coverture, absolutely entitled, and any property over which she had a general power of appointment, exactly as it would do in the case of a man or *feme sole* dying indebted. Given the relation of Debtor and Creditor in equity, all the consequences of such relation would appear to follow just as if there were no coverture in the case.

But the case of *Vaughan* v. *Vanderstegen* was before the Lord Justice *Turner* in *Johnson* v. *Gallagher* (2), and it was with the full knowledge of that case, and after having had the advantage of well weighing the judgment of Vice-Chancellor *Kindersley*, that the Lord Justice *Turner* laid down the propositions which have been previously cited, and the concurrence of their Lordships with which has been above stated.

It appears to their Lordships, therefore, that it was not necessary for the Plaintiff to make out a case of fraud. All that was

(1) 2 Drew. 165, 363. (2) 3 D. F. & J. 515.

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necessary was to shew that the married woman intended to contract so as to make herself, that is to say, her separate property, the Debtor, and upon the facts of this case that does not appear to be open to any substantial doubt. Assuming for the moment that the Letter did not operate as a defective execution of her power, it at all events shewed unequivocally that she contracted that her interest in the Intestate's estate, *i.e.*, her separate property, should be liable to the debt.

In the Supreme Court it was considered sufficient to say, that the case was based entirely on fraud, and that the fraud not being proved, the Bill ought to be dismissed with costs. Their Lordships agree that the fraud was not proved. They are satisfied that the non-mention of the Settlement (if it was not mentioned) was perfectly honest. The Lady and her Husband well knew that what she had reserved to herself would be an ample security for anything which she was likely to overdraw pending the winding-up of the estate, which probably was protracted for many more years than they contemplated, and the Lady and her Husband (as their Lordships are satisfied) honestly intended to give, and did give, that ample security.

It may be right, in order to avoid any possible misapprehension of the judgment of the Supreme Court, to say a few words on the effect of a charge of fraud made and not proved. If the case is based on the fraud, the failure to prove it must be, like the failure to prove any other essential ingredient, fatal. But if striking out the charge of fraud there is sufficient equity stated and proved, if, as in this case, the fraud is thrown in by way of subsidiary answer to the counter-case of the Defendants, it is a matter only affecting costs.

Their Lordships are of opinion, that on each of the several grounds stated above, the Plaintiff is entitled substantially to the relief asked in the second and third paragraph of the Bill.

The injunction asked was probably not necessary, as it is difficult to see how any action at law could be sustained; but it was however proper, as the action at law could not have properly tried the real questions between the parties, which were as to their respective priorities over the separate trust estate of a *feme covert*. As to the costs of the proceedings, of course, the costs paid by the Plaintiff must be repaid to him. As to his own costs their

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Lordships are of opinion, having regard to the nature of the suit and claim, that the proper Order will be, that they should add their costs to their debt. Their Lordships will, therefore, humbly recommend to Her Majesty as follows:—That the Orders of the Supreme Court of *Victoria* ought to be discharged, and in lieu thereof a declaration made that the share to which *Anne Young Aitkin* (formerly *Ware*) was entitled as Widow of the Intestate in his personal estate, to the extent of the £15,000 mentioned in the Settlement, and the moneys payable in respect of her Dower in his real estate, are liable to make good the sum due to the Plaintiff, with interest as aforesaid in respect of the said overdraft. And that until such overdraft is fully paid, the Plaintiff has a lien upon and is entitled to retain the said deposits of £8,000 and £6,000, as representing part of the sum of £15,000, as security for the same.

That an account be taken of what was due in respect of the overdraft in the Bill mentioned for principal and interest up to the time when the deposited sums of £8,000 and £6,000 were carried to a suspense account, and a like account of principal and interest on those sums up to the same date, and the balance at that date, ascertained. That the taxed costs of the Plaintiff of the suit in the Courts below and of this appeal be added to or set off against such balance as the case may be. Any balance due from the Bank to be paid to the legal personal representative of Mrs. *Aitkin;* and as to any balance due to the Bank, they are to be at liberty to apply, as they may be advised, in the administration suit, for payment out of her share of the Intestate's estate, to the extent of the said sum of £15,000 and the arrears of Dower. And the decree is to be without prejudice, as to how, as between the persons interested under the Settlement and Will, and as respects any other estate of Mrs. *Aitkin,* the debt of the Bank ought to be borne.

That the costs paid by the Plaintiff to any parties be repaid to him.

Solicitors for the Appellant: Messrs. *Freshfields.*

Solicitors for the Respondents: Messrs. *Murray & Hutchins;* Messrs. *Sladen & Mackenzie,* and Messrs. *Wadeson & Malleson.*

OUR SOVEREIGN LADY THE QUEEN . . APPELLANT; J. C.*

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EDWARD COOTE . . . . . RESPONDENT. *March* 11.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Lower Canada, law of—Felony—Evidence—Depositions taken on Oath, before Trial on a criminal charge—New Trial—Canadian Statute, 32 & 33 *Vict. c.* 29, *s.* 80—*Practice—Leave to appeal in a criminal case.*

According to the English law, introduced into *Lower Canada* at the time of the cession of *Canada* to *England* in 1763, and unaffected by subsequent Canadian or Imperial Statutes, the depositions on oath of a Witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge.

The only exception is, in the case of answers to questions which he objected to when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer.

A. was indicted for Felony. At the trial the Crown put in evidence depositions sworn to by him, without being cautioned that what he so deposed to might be given in evidence against him, before Fire Commissioners empowered by the *Quebec* Statutes, 31 Vict. c. 31, and 32 Vict. c. 29, to investigate the origin of any Fires occurring in *Quebec*, and before any charge or accusation had been made against him. *Held*, that the depositions were properly admitted as evidence against the Prisoner at the Trial.

Semble:—Chap. 77, s. 63, of the Consolidated Statutes of *Canada*, giving the Court of Queen's Bench power to direct a new Trial, is repealed by the Canadiant Statute, 32 & 33 Vict. c. 29, s. 80.

On petition by the Attorney-General of the Province of *Quebec*, special leave to appeal granted from a judgment of the Queen's Bench, *Quebec*, on a case reserved in a Trial for Felony.

IN this case special leave to appeal was granted from a judgment of the Court of Queen's Bench of the Province of *Quebec, Canada*, on a case reserved for that Court by Mr. Justice *Badgley*, under the powers of the Consolidated Statutes of *Lower Canada*, c. 77, ss. 57 and 58 (1) on a trial of the Respondent for Arson.

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

(1) By the Consolidated Statutes of *Lower Canada*, c. 77, s. 57, it is provided, that when any person has been convicted of any Felony at any Crimi-

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The case so reserved by Mr. Justice *Badgley* was as follows:—

"The Prisoner, *Edward Coote*, was indicted for Arson of a Warehouse in his occupation, and belonging to *Alexander Roy*.

"The Indictment contained four counts: The first, with intent to defraud the *Scottish Provincial Insurance Company;* second, to defraud the *Royal Insurance Company;* the third, to defraud generally; and the fourth, to injure generally. Upon his plea of not guilty he was tried before the Court of Queen's Bench, at the Criminal Term of the said Court, holden by me at *Montreal*, before a competent jury, empanelled in the usual manner, and after evidence adduced by the Crown and by the Prisoner, was found guilty, the jury returning a general verdict of guilty.

"In the course of the adduction of the evidence for the Crown, two depositions made and sworn to by the Prisoner, with his signature subscribed to each, taken by the Fire Commissioners (1) at their investigation into the cause and origin of the fire at his Ware-

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nal Term of the Court of Queen's Bench, the Court before which the case has been tried may in its discretion reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the Judgment until such question has been considered and decided by the said Court of Queen's Bench.

By sect. 58, the said Court shall thereupon state in a Case, to be signed by the presiding Judge, the question or questions of law, with the special circumstances upon which the same have arisen. The said Court of Queen's Bench shall have full power and authority at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein; and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment on the trial of which such question arose, or to avoid such judgment, and order an entry to be made on the record that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other Criminal Term of the said Court, if no judgment has before that term been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires.

(1) The Fire Commissioners, before whom the depositions were taken, were appointed under the Statutes of the Provincial Legislature of *Quebec*, 31 Vict. c. 32, and 32 Vict. c. 29. In pursuance of those Statutes they were empowered to investigate the origin of any Fires occurring in the cities of *Quebec* and *Montreal*, to compel the attendance of Witnesses, and examine them on oath, and to commit to prison any Witnesses refusing to answer without just cause.

house, before any charge or accusation against him or any other person had been made, were produced in evidence, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the Prisoner to their production in evidence, and after his said objection had been overruled; after the conviction of the Prisoner, and before sentence was pronounced by me thereon, he moved the Court by two motions filed in Court in the terms following."

The case then set out the two motions, of which the first is immaterial, as Mr. Justice *Badgley* rejected it, and reserved no question respecting it; the second was in the following terms:—

"Motion on behalf of the said *Edward Coote*, that judgment upon the said Indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside, and the said Defendant, to wit the said *Edward Coote*, be relieved therefrom, for, among others, the following reasons."

A great many reasons were then set out, the only ones material to the present appeal being, that the two depositions were inadmissible in evidence, because the Fire Commissioners before whom they were taken had no authority to administer an Oath, or take such depositions, and such depositions were not admissible as statements made by the Prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an Oath.

The case then stated the rejection of the first motion, and that the Judge, though himself considering the reasons given insufficient to support the second motion, yet, as doubts might be held by the Court of Queen's Bench as to the legal production of the depositions, reserved it, and held it over for decision with reference to the admission of the depositions by the Court of Queen's Bench.

The reserved case came on for argument in the Court of Queen's Bench, appeal side, before the Chief Justice *Duval*, and the Justices *Caron*, *Drummond*, *Badgley*, and *Monk*; and on the 15th of March, 1872, the Court gave judgment in the following terms: "After hearing Counsel as well on behalf of the Prisoner as for the Crown, and due deliberation had, on the case transmitted to

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this Court from the Court of Queen's Bench, sitting on the Crown side at *Montreal*, it is considered, adjudged, and finally determined by the Court now here, pursuant to the Statute in that behalf, that an entry be made on the Record to the effect, that in the opinion of this Court the production of the depositions made by the Prisoner before the Fire Commissioners at *Montreal* was illegal, and, therefore, that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set aside.

"But this Court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said Prisoner, *Edward Coote*, be tried anew on the Indictment found and now pending against him, as if no Trial had been had in the case; and that for the purpose of standing such new Trial he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the Crown side, at *Montreal*, and thereafter, from day to day, until duly discharged."

From this judgment the Justices *Badgley* and *Monk* dissented.

The Prisoner was discharged on his recognisance to appear on a new Trial.

An application made by the Attorney-General for the Province of *Quebec*, to the Court of Queen's Bench, for leave to appeal to Her Majesty in Council from this judgment, was refused. A petition was then presented by the Attorney-General of *Quebec* to the Queen in Council, praying for special leave to appeal from the above judgment. The petition was heard by the Judicial Committee on the 30th of April, 1872.

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Sir *R. Palmer*, Q.C., and Mr. *H. M. Bompas*, for the Petitioner.

Their Lordships granted the application; and by an Order in Council, dated the 10th of May, 1872, special leave to appeal from the judgment of the Court of Queen's Bench of the 15th of March, 1872, was granted.

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

As no appearance was entered for the Respondent, the appeal was heard *ex parte.*

Sir *John Karslake,* Q.C. (Mr. *H. M. Bompas* with him), for the Appellant:—

This case is governed by English Law. The Criminal Law of *England* was introduced into *Canada* at the time of the cession of *Canada* to *England,* in the year 1763, and the Criminal Law of *England* at that time still continues in force, except so far as it has been altered by Canadian or Imperial Statutes applicable to *Canada.* Statutes of *Quebec,* 31 Vict. c. 32, s. 3, and ss. 4, 6, and 7, s. 5, and s. 8. Our contention is, that the depositions of the Prisoner were properly received in evidence by the Judge before whom the indictment was tried. The Fire Commissioners before whom the depositions were taken, had under the Provincial Statutes, 31 Vict. c. 32 and 32 Vict. c. 29, power to compel the attendance of Witnesses, to examine them on Oath, and also to commit for contempt. Such depositions were admissible in evidence against the Prisoner, although made on Oath by him as a Witness whose attendance might have been compelled, and without caution that his statement might be given in evidence against him: *Russell* on Crimes, Vol. III. p. 418 [4th Ed.], where the cases are collected; *Taylor* on Evidence, Vol. I., p. 743 [3rd Ed.]; *Roscoe's* Criminal Evidence, p. 62 [7th Ed.]; *Joy* on Confess., pp. 62, 68; *Rex* v. *Garbett* (1); *Reg.* v. *Lewis* (2); *Reg.* v. *Haworth* (3); *Reg.* v. *Goldshede* (4); *Reg.* v. *Sloggett* (5); *Reg.* v. *Chidley and Cummins* (6); *Reg.* v. *Gillis* (7).

There was no substantial ground for moving an arrest of judgment, nor had the Court power to award a new Trial. Chapter 77, s. 63, of the Consolidated Statutes of *Lower Canada,* gave the Court of Queen's Bench power to direct a new Trial; but that Statute was repealed by a subsequent Statute, 32 & 33 Vict. c. 29, s. 80, which section contains no power authorizing the Court of Queen's Bench to grant a new trial in a criminal case.

(1) Den. C. C. 236.
(2) 6 C. & P. 161.
(3) 4 C. & P. 254.
(4) 1 C. & K. 657.
(5) Dears. C. C. 656.
(6) 8 Cox's C. C. 365.
(7) 17 Ir. C. L. Rep. 512.

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At the conclusion of Sir *John Karslake's* argument their Lordships intimated that, if necessary, they would call on Mr. *Bompas*. He was not called on and

Judgment was now delivered by

SIR ROBERT COLLIER:—

Edward Coote (the Respondent) was convicted of Arson, subject to a question of law reserved by Mr. Justice *Badgley* (the Judge who presided at the Trial) for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 77, sect. 57, of the Consolidated Statutes of *Lower Canada*. The question reserved was, whether or not the Prosecutor was entitled to read as evidence against the Prisoner depositions made by him under the following circumstances:—

An Act of the *Quebec* Legislature appointed Officers named "Fire Marshals" for *Quebec* and *Montreal* respectively, with power to inquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any Judge of Session, Recorder, or Coroner, to summon before him and examine upon Oath all persons whom he deemed capable of giving information or evidence touching or concerning such fire." These Officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a Justice of the Peace.

Upon an inquiry held in pursuance of this Statute as to the origin of a fire in a Warehouse of which *Coote* was the occupier, he was examined on Oath as a Witness. No copy of his depositions accompanies the Record, but their Lordships accept the following statement of Mr. Justice *Badgley* as to the circumstances under which they were taken:—

"Among the several persons examined respecting that fire was *Coote* himself, upon two occasions, at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and

which was attested by the Commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, *Coote* was arrested upon the charge of Arson of his premises, and duly committed for trial."

At his Trial the above-mentioned depositions were duly proved, and admitted in evidence, after being objected to by the Counsel for the Prisoner. The objection taken at the Trial appears to have been, that to constitute such a Court as that of the Fire Marshal was beyond the power of the Provincial Legislature, and that consequently the depositions were illegally taken. Subsequently, other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole Court (in their Lordships' opinion rightly) that the constitution of the Court of the "Fire Marshal," with the powers given to it, was within the competency of the Provincial Legislature; but it was further held by a majority of the Court that the depositions of the Prisoner were not admissible against him, because they were taken upon Oath, and because he was not cautioned that whatever he said might be given in evidence against him, after the manner in which Justices of the Peace are required to caution accused persons by an Act of the British Parliament adopted in this respect by the Colonial Legislature. The Court held the conviction to be bad, but, inasmuch as the objection to it was not founded on the merits of the case, made an Order directing a new trial.

Their Lordships are unable to concur in what appears to be the view of one of the Judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a Prisoner of statements made by him upon Oath is so unsettled, that every Judge is at liberty in every case to act upon his own individual opinion.

It is true that doubts have, from time to time, arisen on this subject, and that conflicting *dicta*, and indeed decisions, may be

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found upon it; but, in their Lordships' opinion, all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been, if properly understood.

In the case of *Rex* v. *Haworth* (1) a deposition on Oath made by the Prisoner as a Witness against a person named *Shearer*, on a charge of Forgery, was received in evidence by Mr. Justice *Parke* against the Prisoner, on an indictment for Forgery. In *Reg.* v. *Goldshede and another* (2), Lord *Denman* admitted against the Defendants, on a charge of conspiracy, answers which they had made on Oath in a suit in Chancery. In *Reg.* v. *Sloggett* (3) the Prisoner was examined in the Court of Bankruptcy, under an adjudication against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the Commissioner to consider himself in custody. On a case reserved, it was held by the Court of Criminal appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case, *Jervis*, C.J., observes, "The test is, whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg.* v. *Chidley and Cummins* (4), *Cockburn*, C.J., admitted a deposition made by *Cummins*, when *Chidley* alone was accused of the offence for which they were afterwards both tried. The learned Editor of the 4th edition of "*Russell* on Crimes" thus reports a case of *Reg.* v. *Sarah Chesham* (5).

"Where the Prisoner was indicted for administering poison with intent to murder her Husband, the Coroner stated, that he had held an inquest on his body, which was adjourned, and that the Prisoner was present as a Witness on the second occasion; no charge had at that time been made against her; she made a statement on Oath, which the Coroner took down in writing. Lord *Campbell*, C.J., after consulting *Parke*, B., admitted the statement, and the Prisoner was convicted and executed."

(1) 4 C. & P. 254.
(2) 1 C. & K. 657.
(3) Dears. C. C. 656.
(4) 8 Cox's C. C. 365.
(5) Russell on Crimes, vol. iii. p. 418 [4th Ed.].

The case of *Reg* v. *Garbett* (1) accords with the foregoing. There the Prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held by a majority of the Judges on a Crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible.

The case of *Reg.* v. *Scott* (2) seems to go somewhat further. It was then held by the Court of Criminal appeal (*Coleridge*, J., dissenting) that although, under the Bankruptcy Act then in force (12 & 13 Vict. c. 106), the Bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the improper exercise of judicial authority

From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on Oath of a Witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "*nemo tenetur seipsum accusare*," but does not apply to answers given without objection, which are to be deemed voluntary.

The Chief Justice indeed suggests, that *Coote* may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that *Coote* was acquainted with so much of the law; but be this as it may, it is obvious, that to institute an inquiry in each case as to the extent of the Prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to

(1) Den. C. C. 236. (2) Dears. & B. C. C. 47.

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the rule, recognised as essential to the administration of the Criminal Law, "*Ignorantia juris non excusat.*" With respect to the objection, that *Coote* when a Witness should have been cautioned in the manner in which it is directed by Statute, that persons accused before Magistrates are to be cautioned (a question said by Mr. Justice *Badgley* not to have been reserved, but which is treated as reserved by the Court), it is enough to say, that the caution is by the terms of the Statutes applicable to accused persons only, and has no application whatever to Witnesses. If, indeed, the Fire Marshal had exercised the power which he possessed of arresting *Coote* on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been received.

A question has been raised on the part of the Crown, whether or not the Court had the power of ordering a new Trial, inasmuch as c. 77, s. 63, of the Consolidated Statutes of *Canada*, giving the Court power to direct a new Trial, has been repealed by the subsequent Statute, 32 & 33 Vict. c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the case it becomes unnecessary to determine this question.

For the reasons above given, their Lordships will humbly advise Her Majesty, that the judgment made by the Court of Queen's Bench be reversed,—that the conviction be affirmed,—and that the Court of Queen's Bench be directed to cause the proper sentence to be passed thereon.

By an Order in Council, it was ordered, that the judgment of the Court of Queen's Bench of the 15th of March, 1872, be reversed, and the conviction of the Respondent, *Edward Coote*, affirmed, and the Court of Queen's Bench, Province of *Lower Canada*, was directed to cause the proper sentence to be passed thereon.

Solicitors for the Appellant: *Bischoff, Bompas, & Bischoff.*

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BARRISTER.] Two Orders of the High Court of the *North-Western Provinces*, the one being an Order *nisi* calling on the Appellant, a Barrister and Advocate practising in that Court, to shew cause why he should not be suspended from the practice of his profession as an Advocate of that Court, and the other Order declaring him guilty of gross professional misconduct, and suspending him from practice for five years, on appeal as to the rule on which the first Order was made discharged, and the second Order reversed; the Judicial Committee being of opinion that, though the Appellant had been guilty of a grave irregularity and deserving of censure, yet the facts proved did not amount to that *mala praxis* on which the High Court, having regard to the position and functions of an Advocate in the *North-Western Provinces*, could fairly found any proceeding of a penal character. *In re* NEWTON

BOTTOMRY BOND.] 1. A Greek Ship having on board a Cargo consigned to *Malta*, the port of destination, having encountered severe weather in her passage down the *Black Sea*, was obliged, for the preservation of her Cargo, to jettison her boats, spars, and cables, and being disabled put into *Constantinople*, where the Captain applied to the Greek Consular Court, and obtained an order for a survey of the Ship and Cargo, and a sentence of Average settlement, with the appointment of a Curator, who, by virtue of the authority conferred on him, hypothecated the Cargo, and caused a Bottomry Bond to be executed thereon for freight and the necessary expenses of transhipping and forwarding the Cargo. The Cargo having been transhipped, arrived at *Malta*, where proceedings were taken in the Court of Commerce by the Consignee to set aside the sentence of Average settlement and to annul the Bottomry Bond.—The Court of Commerce declared its incompetency to decide regarding the Average settlement, but pronounced the Bottomry Bond null and void. On appeal to the Court of Appeal at *Malta*, that Court reversed the decree of the Court of Commerce so far as regarded its competency to decide the Average act and settlement, and ordered, as regarded the decision of the nullity of the Bottomry Bond, that such decision should be set aside until a definite sentence on the Average act and settlement should have been come to by the Court of Commerce. The Court of Commerce gave a decision on the case thus remitted against the Consignee, which was equivalent to a nonsuit. On appeal from this decision, the Appellate Court of *Malta* were of opinion that the Captain having taken the legal course before the Consular Tribunal at Constantinople, and that Court having, on the report of Experts, appointed a Curator of the Cargo, and declared the voyage ended at *Constantinople*, such Curator was the attorney for the Owners of the Cargo, and had authority to hypothecate the same; that where the formalities of a Consular authority and verbal process justifying the expenses necessitating the loan are observed, the lender on the Bottomry Bond is exonerated from justifying the necessity for the loan or making inquiry as to the facts causing such necessity, and decided for the validity of the bond:—*Held*, by the Judicial Committee, affirming the judgment of the appellate Court at *Malta*, that the Greek Consular Court at *Constantinople* being a competent Court, having jurisdiction over a Greek Ship and a Cargo owned by Greek subjects, the sentence of that Court was not open to examination by the Court of Commerce at *Malta*, and that it must be presumed, in the absence of manifest error or fraud, that the Greek Consular Court rightly interpreted and applied the Greek Law, by which they had the power they exercised of deciding that, in the circumstances, *Constantinople* should be considered the place of the ship's destination, and the average adjusted according to the law in force at that place; and that the Bottomry Bond was, in the circumstances, necessary and valid. Messina *v.* Petrococchino - - 144

2. ——. A Bottomry Bond on a Ship and freight was given by the Master for repairs of the Ship (already subject to a mortgage), with an agreement by the Bondholder, the Ship's Agent, that if a Bill of Exchange drawn by the Master upon the Mortgagee should be duly honoured, the Bond should not be enforced. The Drawee died before the Bill was presented, and neither administration nor probate of his Will had been taken out, when the holder of the Bill, in ignorance of the death of the Drawee, presented the Bill for acceptance:—*Held*, that it was not necessary, in order to entitle the Bondholder to enforce the Bottomry Bond, that there should have been such a dishonour of the Bill as might have been necessary to give a right of action against a Drawee or Indorsee of the Bill, and it was sufficient that what was the reasonable course, for the purpose of getting the Bill accepted and paid, should have been taken, which, having regard to the circumstances of the case, appeared to the Judicial Committee to be established; and the Bond held good.—The Bond on the Ship and freight was made absolute on the arrival of the Ship at *Callao*, but the Bond also hypothecated the freight to be earned by the Ship from that place to any other port or ports:—*Held*, that the Bond was good *pro tanto* as to the Ship, but void with respect to the subsequent freight earned in the voyage from *Callao* to *England*. The "Staffordshire" - - 194

BREACH OF CONTRACT BY SHIPOWNER.] The Master of a Prussian Vessel, a subject of the King of *Prussia*, having on board a cargo of nitrate of soda (contraband of war) under a Charterparty and Bill of lading from *Pisagua*, bound to *Cork*, *Cowes*, or *Falmouth*, for orders to proceed to any safe port in *Great Britain* or on the Continent, between *Havre* and *Hamburgh*, both included, and there deliver the cargo, "the act of God, the Queen's enemies, fire, and all and every other risk, dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted," arrived at *Falmouth* on the 10th of July, 1870, and received orders on the 11th of that month to proceed to the French port *Dunkirk*, and there deliver her cargo. On the ship's arrival off *Dunkirk* on the 16th, the Master was informed by a French Pilot that War had broken out between *France* and *Prussia*, whereupon the Master put back to the *Downs* to make inquiries, and anchored there on the 17th, which was Sunday. On the 18th, having telegraphed to the Owners of the Vessel for instructions, he was ordered not to go to *Dunkirk*, and on the 19th he put into *Dover*, where he was informed, as the fact was, that War, which had been imminent from the 10th, had been declared between *France* and the North German Confederation, formal declaration thereof having been given as upon the 19th of July:—*Held* (affirming the decision of the Admiralty Court), that the Master was justified in putting back to the *Downs* for the purpose of ascertaining whether War had been declared, and was guilty of no improper deviation or delay in not returning to *Dunkirk* before the 19th of July, when War was actually declared:—*Held*, further, that the Master committed no breach of contract in refusing to deliver the cargo at *Dunkirk*, and as the Charterparty provided what freight was to be paid if the Cargo was delivered, the delivery at *Dover* was within the terms of the Charterparty, and the Master was entitled to freight for the Cargo from the Owners before delivery thereof.—*Semble*, where a Master receives credible informa-

BOTTOMRY BOND—*continued.*
tion that if he continues in the direct course of his voyage his Ship will be exposed to some imminent peril, as from Pirates, or Icebergs, or other dangers of navigation, he is justified in pausing and deviating from the direct course, and taking any step that a prudent man would take for the purpose of avoiding the danger. THE "TEUTONIA" - - - - - - 171

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CARGO.] The authority of the Master of a Ship to sell the goods of an absent Owner is derived from the necessity of the situation in which he is placed; and consequently, to justify his selling, he must establish (1) a necessity for the sale; and (2) inability to communicate with the Owner. Under these conditions, and by force of them, the Master becomes an Agent of the Owner, not only with the power, but under the obligation (within certain limits) of acting for him; but he is not in any case entitled to substitute his own judgment for the will of the Owner, in selling the goods, where it is possible to communicate with the Owner.—The possibility of communicating with the Owner depends on the circumstances of each case involving the consideration of the facts which create the urgency for an early sale, the distance of the Port from the owner, the means of communication which may exist, and the general position of the Master in the particular emergency. —Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained before the sale. Where, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the Master to obtain the Owner's instructions. The *Bonaparte* (8 Moore's P. C. Cases, 459) and the *Cargo ex Hamburg* (2 Moore's P. C. Cases (N.S.) 289) recognised and followed. THE AUSTRALASIAN STEAM NAVIGATION COMPANY *v.* MORSE 222

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COLLISION: *See* SHIP AND SHIPPING.

COLONIAL LAW.] 1. Article 1688 of the Civil Code of *Lower Canada* enacts that "if a building perish in whole or in part within ten years from a defect in construction, or even from the unfavourable nature of the ground, the Architect superintending the work and the Builder are jointly and severally liable for the loss." Such Article held to be declaratory of the Law of *Lower Canada* as it existed before the promulgation of the Code.—A Builder, before the passing of the Code, contracted to execute in a workmanlike manner all the work requisite to be done in building and completing *Christ Church* Cathedral in *Lower Canada*, according to the plans and drawings made by an Architect, upon foundations already made and completed by a previous Builder, under the direction of his Employer's Architect, the expense of which foundations the Contract stipulated should be estimated and allowed for. The Builder erected the Cathedral in strict conformity with the contract, under the direction of the Architect, and in a workmanlike manner, but the Tower of the Cathedral shortly after it was erected, and before the works were completed, sunk, and considerable damage was done. The cause of the sinking was found to be the insufficiency of the foundations, as planned by the original Architect and constructed by the former Builder:—*Held* (affirming the judgment of the Court of Queen's Bench in *Lower Canada*), in an action by the Builder against his Employer (the Employer claiming to deduct from the contract price agreed to be paid to the Builder the amount of his charges for repairing the damages caused to the Building by the sinking of the Tower through the insufficiency of the foundations), that the Employer was entitled to make the deduction, as the Builder was responsible for the defect in the foundations, and was not freed from liability either by acting under the directions of his Employer's Architect, or by reason of the defective foundations being the work of the preceding Builder.—The decision in the case of *Brown* v. *Laurie* (1 Low. Can. Rep. 343; 5 Low. Can. Rep. 65) adopted. WARDLE *v.* BETHUNE - 33

2. —— A Railway Company in *Lower Canada* constituted by Act of the Provincial Legislature incorporating the *Provincial General Railway Act*, 14 & 15 Vict. c. 51 (Consolidated Statutes of *Canada*, 22 Vict. c. 66), made under their Act a Railway Bridge without giving notice to treat for compensation to the Owner of a Bridge having certain Statutory rights to tolls, by virtue of a special Act, which rights, he alleged, were interfered with by the Railway Bridge. The Owner brought an action *en denonciation de nouvel œuvre* for demolition of the Railway Bridge, and damages occasioned by its erection and use. The Railway Company pleaded *inter alia* the Acts of the Legislature empowering them to make their Railway, and that the Railway Bridge was within the true meaning of those Acts, and was not in violation of the Appellant's Statutory rights:—*Held*, by the Judicial Committee, that assuming the Plaintiff, by virtue of his Special Act, to be entitled to compensation, yet his action failed, inasmuch as the giving notice to treat for compensation was not a condition precedent to the Company's right to exercise their powers, and therefore that the Company were not wrongdoers. JONES *v.* THE

COLONIAL LAW—*continued.*
STANSTEAD, SHEFFORD, AND CHAMBLY RAILROAD COMPANY - - - - - 98

3. —— *M.*, domiciled in *Lower Canada*, in 1865 (before the Civil Code of *Lower Canada* came into operation), being dangerously ill, sent for a Notary to make his Will. The Notary attended with two Witnesses, and *M.* expressed verbally before them the provisions he intended to make by his Will, including an annuity to *A.* The Notary inquired of the Witnesses if they understood *M.'s* wishes, and they said that they did, whereupon the Notary proceeded to reduce *M.'s* expressed intentions into writing in the form of a solemn Will according to the French law, and had written down as far as the bequest of the annuity to *A.*; but before a disposition in favour of his only Daughter, and appointment of Executors was written, *M.* died. The two Witnesses, at the Notary's request, at once made a declaration in writing of what *M.'s* intentions were regarding the disposition to be made by his Will. *A.* petitioned the Superior Court of the Province for Probate of the partly prepared Testamentary paper, and that Court granted Probate of the imperfect instrument, with the Written Statement of the Witnesses, as containing the Will of the deceased. *M.'s* heir was cited and opposed the grant. *A.* afterwards brought an action for payment of the annuity. In defence to the action *M.'s* heir disputed the validity of the Will. The Superior Court gave judgment for *A.*, on the ground that the sentence of the Court granting Probate was conclusive. The Court of Queen's Bench in *Lower Canada* reversed that judgment. —On Appeal, *held*, by the Judicial Committee: First, that according to the uninterrupted practice and usage of the Courts in *Lower Canada* since 1801, on the construction of the *Colonial Act* (41 Geo. 3, c. 4, s. 2), the grant of Probate was not, as in *England*, conclusive, and that it was competent to *M.'s* heir to impugn the Will by way of defence to *A.'s* action. Secondly, that, although *M.* intended to make a Will according to the French law, and the imperfect testamentary paper was void as a Will by that law, yet that the verbal bequest, coupled with the unfinished testamentary paper, was a good bequest as respected personalty, and entitled to Probate, as the Imperial Statute 14 Geo. 3, c. 83, s. 10, introduced the English law as to Wills existing at that time into *Lower Canada*, and carried with it the rules of the English Courts as to the admissibility of oral evidence in cases of nuncupative Wills or unfinished testamentary dispositions of personalty. MIGNEAULT *v.* MALO - - - - - 123

4. —— Exposition and effect of the Roman-Dutch Law prevailing in the *Cape of Good Hope* in respect to a mutual Will made by Husband and Wife.—First, such mutual Will is to be construed as a separate Will, the disposition of each Spouse being treated as applicable to his or her half of the joint property.—Secondly, each Spouse is at liberty to revoke his or her part of the Will during the Co-Testator's lifetime, with or without communication with the Co-Testator, or after the Co-Testator's death.—The power which a surviving Spouse has to revoke a mutual Will, as far as affects half of the property, is taken away upon

COLONIAL LAW—*continued.*
the concurrence of two conditions, (1) where the Will disposes of the joint property on the death of the survivor, the property being consolidated into one mass for the purpose of a joint disposition of it; and (2) if the survivor has accepted some benefit under the Will.—A mutual Will made by Husband and Wife having community of goods, providing for payment of debts, with provision for Children and Grandchildren, and nominating sole and universal heirs:—*Held*, to be revocable by the surviving Spouse, who had not adiated or accepted the provisions therein given, so far as affected her property, and that she was entitled to claim her half of the inheritance. DENYSSEN *v.* MOSTERT - - 236

5. —— Action for damages for non-performance of a contract for the sale of certain Spars and Timber "to be delivered free of charge to-morrow, or as soon as they can be got out of the hands of the Guardian; but the Purchasers not bound to take them if not delivered in one week, unless they like." No delivery having been made within the time specified, by reason of the Guardian in possession of the Spars insisting on retaining them in consequence of a Writ of *saisie arrêt* issued in an action instituted against the ostensible Owner of the Spars and Timber, whose mark they bore, having been served on him, notwithstanding that he was released by subsequent proceedings, and might have legally given them up:—*Held*, that, not having done so, the parties contracting for the sale of the Spars and Timbers were relieved from the damages awarded by the Court below for the non-delivery thereof, on the ground that the reasonable construction of the words getting "out of the hands of the Guardian" was the actual, and not constructive or legal, title to the possession, which could alone ensure the delivery:—*Held*, also, that an action *en garantie*, founded on the former right of action against the Guardian as *garant* by the original Contractors, for damages for wrongful detention of the Spars and Timber, could not, under the circumstances, be sustained; and the judgment made in such an action, awarding damages, reversed. MACLAREN *v.* MURPHY and CONNOLLY *v.* MACLAREN - 262

6. —— The written customary Laws of *Normandy*, since the time of the separation of the island of *Jersey* from that Duchy, are authorities received in *Jersey* as expositions of the Law and Customs of the Island. According to the Law of *Jersey* an illegitimate child is legitimated *per subsequens matrimonium*. A domiciled *Jersey* man was the putative Father of a child by a *Jersey* woman. He afterwards married in *England* the mother of the child:—*Held*, that proof of the certificate of the marriage, coupled with the fact of the child being always acknowledged by him, and received as the offspring of the Husband and Wife, was sufficient evidence without any formal recognition of paternity by the Father. A gratuitous gift by Deed of real estate to a Grandson by his grandfather to the disinheritance of his only Son:—*Held*, void, as by the Law of *Jersey*, the Donor had no power to defeat the law of succession, by which, in the case of an only Son, the estate of the Father descended. LA CLOCHE *v.* LA CLOCHE - - - - - 325

COLONIAL LAW—*continued.*

7. —— *P.R.*, in 1825, by a notarial instrument in the nature of a Deed of donation *inter vivos*, gave his Son, *J. R.*, a certain piece of land, reserving the usufruct to himself for life, with remainder to *J. R.* for life (both life interests being expressed to be "*à titre de constitut et precaire sa vie durante*"); and after *J. R.'s* death to his children born in lawful wedlock; in default of such "*la propriété demeurera et appartiendra aux autres héritiers du dit donateur qui en jouiront et disposeront conformément à ce qu'il en aura dispose et ordonné par son Testament et ordonnance de dernière volonté.*" By a Will of previous date, confirmed by a Codicil made after the date of the Deed of donation, *P. R.* gave to his son, *J. R.*, the enjoyment and usufruct, during his life, of all the property moveable or immoveable which he, *P. R.*, should have at his death, the absolute interest in such property to pass at the death of *J. R.* to his children born in wedlock, with power, in default of such children, to *J. R.*, to dispose of such property at his discretion, and without being bound to follow any rule of equality or proportion, among the testator, *P. R.'s* Grandchildren, who were to be content with the share to be assigned to them. *J. R.* died without children, and by his Will bequeathed, with other property, some of the land comprised in the Deed of donation, by *P. R.* in his favour, to two only of the Grandchildren of *P. R.* In a suit by another of *P. R.'s* Grandchildren, claiming a portion of such land as heir by substitution under the terms of the Deed:—*Held*, by the Judicial Committee, affirming the judgment of the Court of Queen's Bench of *Lower Canada*, that notwithstanding the words "*à titre de constitut et precaire sa vie durante*" in the Deed of donation, *J. R.* became under it the institute (*grevé*) with a substitution in favour of his own children, and that the term "*autres héritiers*" operated only in the event of *J. R.* having no children as a *retour* to the donor, and made the property capable of passing by his Will, as also by the Will of his son, *J. R.* Exposition of the Civil Code of *Lower Canada* with regard to gifts *inter vivos*, with reference to the Text Writers on the ancient law of *France* and the *Code Napoléon*. The Statute law of *Lower Canada*, has engrafted on the old French law an unlimited power of disposition by Will. The word "*Héritiers*" has there acquired a signification, wider than and differing from that which it would obtain in *France*. HERSE *v.* DUFAUX - - - 468

8. —— The *Canadian Statute*, 27 & 28 Vict. c. 13, intituled "An Act to amend the Laws respecting the navigation of Canadian Waters," enacts, by sect. 14, that "No Owner or Master of any Ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such within any place where the employment of such Pilot is compulsory by law;" And the *Canadian Statute*, 27 & 28 Vict. c. 58, s. 9, enacts, that "The Master or person in charge of each Vessel, exceeding 125 tons, coming from a port out of the Province of *Quebec*, and leaving the port of *Quebec* for *Montreal*, shall take on board a branch Pilot, for and above the harbour

COLONIAL LAW—*continued.*

of *Quebec*, to conduct such Vessel, under a penalty equal in amount to the pilotage of the Vessel, which penalty shall go to the Decayed Pilot Fund;"—*Held*, on appeal, affirming the judgment of the Vice-Admiralty Court of *Lower Canada*, in a cause of damage by collision, that these Statutes are to be read and construed together as being *in pari materiâ*, constituting a compulsory pilotage and exonerating the Owner of a Vessel having such Pilot on board from liability for damage inflicted on another Vessel. THE "HIBERNIAN" - - - - - - 511

9. —— The *Australian Fencing Act*, No. 6, of 1865 does not apply to waste lands in *South Australia* held on lease from the Crown for pastoral purposes. BROWN *v.* MCLACHLAN - 543

10. —— Construction of bequests in a Will made in the *mystique* or secret form, in accordance with the *Code Civil*, the law prevailing in the *Mauritius*. The Testator at the time of making his Will was living in cohabitation with a woman, by whom he had had two children, and whom he therein recognised and provided for as follows: "*J'ai reconnu pour mes enfants naturels &c.*; *et je donne et lègue à ces enfants la moitié de tous les biens généralement quelconques que je lasserai au jour de mon déces*," and disposed of the whole of his *quotité disponible* in favour of other legatees. The Testator afterwards married the Mother of his children, who thereby by the *Code Civil*, Art. 331, became legitimatized; but neither before nor after his marriage revoked, altered, or republished his Will, or left any other heirs entitled to the succession. On a suit by one of the Legatees for the recovery of a Legacy bequeathed to her by the Will, against the Mother of his children acting as Testamentary executrix of the Testator, who, among other pleas, contended that even if the bequest was valid it ought to be reduced, inasmuch as that and the other Legacies given by the Will exceeded the disposable proportion (*quotité disponible*), of the Testator's succession, the children being by the Will entitled to one half of such succession in preference to all other legacies given by the Will:—*Held* by the Judicial Committee (affirming the Judgment of the Supreme Court) that upon the true construction of the Will, the legacy given to the children was a gift of a moiety of the whole succession, and not a moiety of the *quotité disponible* only: and that as the children were by law entitled to a legal reserve of two-thirds of the estate of their late Father, if they elected to claim such reserve, which would reduce the Plaintiff's legacy, the Mother as their Guardian must make election between the one half bequeathed by the Will and the two-thirds, the legal reserve. LAGESSE *v.* LAGESSE - 553

11. —— According to the English law, introduced into *Lower Canada* at the time of the cession of *Canada* to *England* in 1763, and unaffected by subsequent Canadian or Imperial Statutes, the depositions on oath of a Witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge.—The only exception is, in the case of answers to questions which he objected to when his evidence was taken as tending to criminate him, but which he has been improperly compelled

COLONIAL LAW—*continued.*

to answer.—*A.* was indicted for felony. At the trial the Crown put in evidence depositions sworn to by him without being cautioned that what he so deposed to might be given as evidence against him before Fire Commissioners empowered by the *Quebec* Statutes, 31 Vict. c. 31, & 32 Vict. c. 29, to investigate the origin of any fires occurring in *Quebec*, and before any charge or accusation had been made against him.—*Held*, that the depositions were properly admitted as evidence against the Prisoner at the Trial.—*Semble*:—Chap. 77, s. 63, of the Consolidated Statutes of *Canada*, giving the Court of Queen's Bench power to direct a new Trial, is repealed by the Canadian Statute, 32 & 33 Vict c. 29, s. 80. REG. *v.* COOTE - 599

COMMUNITY OF GOODS: *See* COLONIAL LAW. 4.

COMPENSATION FOR RIGHTS INJURIOUSLY AFFECTED BY A RAILWAY COMPANY: *See* COLONIAL LAW. 2.

COMPULSORY PILOTAGE: *See* COLONIAL LAW. 8.

CONCURRENT JUDGMENTS — Qualification of Rule with respect to, on a question of fact: *See* PRACTICE. 6.

CONDITION PRECEDENT: *See* COLONIAL LAW. 2.

CONSTRUCTION OF BEQUESTS IN A WILL: *See* COLONIAL LAW. 10.

CONSTRUCTION OF CANADIAN STATUTES—32 & 33 Vict. c. 29, s. 80: *See* COLONIAL LAW. 11.

CONSTRUCTION OF INDIAN ACT—No. XIV. of 1859, sect. 1. cl. 16: *See* HAY *v.* GORDON - - - - 337

CONSTRUCTION OF STATUTE.] 1. The Canadian Statutes, 27 & 28 Vict. c. 13, s. 14, and 27 & 28 Vict. c. 58, s. 9, are to be read and construed together as being *in pari materiâ*.—Where a Statute inflicts a penalty for not doing an Act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination. THE "HIBERNIAN" - - - - 511

2. —— Upon the construction of sect. 25 of 15 & 16 Vict. c. 83, *Held* that that section does not apply where an English Patent is taken out in this country before a Patent for invention is taken out in a foreign country. *In re* WINAN'S PATENT [93

3. —— of Statute 15 & 16 Vict. c. 83, s. 25, in respect to a petition for prolongation of a Patent where a Foreign Patent has expired. *In re* BLAKE'S PATENT - - - - 535

4. —— If a Statute professes merely to repeal a former Statute of limited operation, and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them, is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shewn. BROWN *v.* MCLACHLAN - - 543

CONSULAR COURT AT CONSTANTINOPLE: *See* BOTTOMRY BOND. 1.

CONTEMPT.] Order of Suspension, *ab officio et à beneficio*, decreed against a Clerk in Orders, the perpetual Curate of a Chapel of Ease to a Parish Church, for persistent contempt in disobeying a

CONTEMPT—*continued.*

Monition issued to enforce obedience to an Order in Council, made in an Ecclesiastical cause, declaring illegal and prohibiting the practice of certain rites and ceremonies and the use of certain Vestments in the services of the Church. HEBBERT *v.* PURCHAS - - - - - 301

CONTRACT FOR SALE OF TIMBER IN POSSESSION OF GUARDIAN: *See* COLONIAL LAW. 6.

COSTS.] 1. Where there were several Opponents; on dismissing the Petition a lump sum was awarded to the Opponents to be divided *pro ratâ* for costs. *In re* JOHNSON'S PATENT - - 75

2. —— Considerations which induce the Judicial Committee to give costs to *bonâ fide* Opponents in patent cases. *In re* WIELD'S PATENT 89

3. —— Whether a Court of Admiralty has power, under the *Foreign Enlistment Act*, 1870, to condemn the Crown in costs, *quære*. THE "GAUNTLET" - - - - 184

4. —— It is a rule in the Admiralty Court, in cases where a collision is found to be the result of inevitable accident, to make no order as to costs, unless it can be shewn that the suit was brought unreasonably and without sufficient *primâ facie* grounds. This rule followed by the Appellate Court. *The London* (Br. & L. 82) approved. THE "MARPESIA" - - - - - 212

—— *See also* PLEADING.

CRIMINAL CASE, SPECIAL LEAVE ALLOWED TO APPEAL. REG. *v.* COOTE - 599

CROWN: *See* COSTS. 3.

CROWN LEASES IN SOUTH AUSTRALIA: *See* COLONIAL LAW. 9.

CUSTODY OF INFANT: *See* INFANT.

DAMAGES FOR NON-PERFORMANCE OF CONTRACT: *See* COLONIAL LAW. 5.

DEBTS CONTRACTED BY A MARRIED WOMAN HAVING A SEPARATE ESTATE: *See* SEPARATE ESTATE OF MARRIED WOMAN.

DECISIONS APPROVED, OVERRULED, OR IMPEACHED:—1. The decision in the case of *Brown* v. *Laurie* (1 Low. Can. Rep. 343; 5 Low. Can. Rep. 65) adopted. WARDLE *v.* BETHUNE - 33

2. —— Decisions in *In re Bett's Patent* (1 Moore's P. C. Cases (N.S.) 49) approved of, and *In re Poole's Patent* (4 Moore's P. C. Cases (N.S.) 452) observed on. *In re* JOHNSON'S PATENT 75

3. —— The case of *Dent* v. *Smith* (Law Rep. 4 Q. B. 414) followed. MESSINA *v.* PETROCOCCHINO - - - - - - 144

4. —— The case of *The Jacob* (4 Rob. 245) commented on. THE "STAFFORDSHIRE" - 194

5. —— *The Virgil* (2 W. Rob. 205) followed and approved. THE "MARPESIA" - - 212

6. —— The principles laid down in *The Bolina* (3 Notes of Cases, 210) affirmed. THE "MARPESIA" - - - - - 212

7. —— *The London* (Br. & L. 82) followed. THE "MARPESIA" - - - - - 212

8. —— *The Bonaparte* (8 Moo. P. C. Cases, 459) and *The Cargo ex Hamburg* (2 Moo. P. C. Cases, (N.S.) 289) recognised and followed. THE

DECISIONS APPROVED, OVERRULED, OR IMPEACHED—*continued.*

Australian Steam Navigation Company *v.* Morse - - - - - - 222

9. —— *Williams* v. *Bishop of Salisbury* (2 Moore's P. C. Cases (N.S.) 375) referred to and approved. Sheppard *v.* Bennett (First Appeal) [351

10. —— *Westerton* v. *Liddell* (Special Report by E. F. Moore, 1857), referred to. Sheppard *v.* Bennett (Second Appeal) - - - 372

11. —— *Martin* v. *Mackonochie* (Law Rep. 2 P. C. 365) referred to. Sheppard *v.* Bennett (Second Appeal) - - - - 373

12. —— *Cox* v. *Hickman* (8 H. L. C. 268) and *Bullen* v. *Sharp* (Law Rep. 1 C. P. 86) referred to and acted on. Mollwo, March, & Co. *v.* Court of Wards - - - - - 419

13. —— *Somerville* v. *Hawkins* (10 C. B. 583) and *Spill* v. *Maule* (Law Rep. 4 Ex. 232) followed. Laughton *v.* Bishop of Sodor and Man - 495

14. —— *Whiteley* v. *Adams* (15 C. B. (N.S.) 392) and *Wright* v. *Woodgate* (2 C. M. & R. 573) recognized and affirmed. Laughton *v.* Bishop of Sodor and Man - - - 495

15. —— *The Velocity* (Law Rep. 3 P. C. 44) followed. Malcomson *v.* General Steam Navigation Company. The "Ranger" and The "Cologne" - - - - - 520

16. —— *In re Winan's Patent* (Law Rep. 4 P. C. 93) followed. *In re* Blake's Patent 535

17. —— *Johnson* v. *Gallagher* (3 D. F. & J. 494) approved and adopted. The London Chartered Bank of Australia *v.* Lemprière - 573

18. —— *Shattock* v. *Shattock* (Law Rep. 2 Eq. 182) dissented from. The London Chartered Bank of Australia *v.* Lemprière - - 573

DECLARATION, AMENDMENT OF, TIME TO APPLY: *See* Trial.

DELAY IN DELIVERY OF CARGO: *See* Breach of Contract by Shipowners.

DEPOSITIONS TAKEN ON OATH BEFORE TRIAL ON A CRIMINAL CHARGE: *See* Evidence.

DIVORCE—The *Indian Divorce Act*, No. IV., of 1869, sect. 7, provides that in all suits and proceedings brought under that Act relief is to be given on principles and rules which in the opinion of the Courts are as nearly as may be conformable to the principles and rules which the Court for Divorce and Matrimonial Causes in *England* acts on and gives relief.—The alleged cause of action arose in 1859 or 1860, the misconduct of the Wife having come to the knowledge of the Husband in 1862. He took no steps till 1869, when he brought a suit in *India* under Act No. 4 of 1869 for a Divorce *à vinculo*, charging his wife with adultery with the Co-Respondent *A.* and others. The suit was heard in the absence of *A.*, and the Wife did not appear. The Court of First Instance dissolved the marriage. On an appeal to the Chief Court, application was made to hear further evidence as provided by the 17th Section of the Act, which the Court refused, and by its decree confirmed the sentence of the first Court:—*Held*, by the Judicial Committee, that in the absence of *A.*,

DIVORCE—*continued.*

and the refusal to allow him to be examined to rebut the Plaintiff's case, and considering the inconclusive and unsatisfactory nature of the evidence, coupled with the long delay in bringing the suit, such decree of confirmation could not be maintained, and the sentence reversed with costs in the Courts below and on appeal.—The reservations contained in the *Limitation of Suits Act*, No. XIV. of 1859, sect. 1, cl. 16, do not apply to suits for Divorce *à vinculo*. Hay *v.* Gordon - 337

DOCTRINE OF THE REAL PRESENCE: *See* Ecclesiastical Law. 2.

DOCTRINES OF THE CHURCH OF ENGLAND: *See* Ecclesiastical Law. 2.

DONATION INTER VIVOS: *See* Colonial Law. 1.

DROIT DE RETOUR: *See* Colonial Law. 1.

ECCLESIASTICAL LAW.] 1. A Commission issued by the Bishop in pursuance of the *Church Discipline Act*, 3 & 4 Vict. c. 86, is merely a preparatory step to ascertain whether or not there is sufficient *primâ facie* case for further inquiry before a regular Tribunal. It is not necessary therefore, to state in such Commission more than the generic nature of the offence, sufficient to found the Articles on, and to give the party proceeded against notice of the general nature of the charges he is called upon to answer, and which must be fully specified in the Articles to be exhibited.—A Commission having been issued by the Bishop to inquire as to the grounds of a charge against a Clergyman of the Church of England of publishing heretical doctrines in certain works, "containing (as alleged) the following, among other printed and published statements," which were specially set forth. The Commissioners reported that there was sufficient *primâ facie* ground for instituting further proceedings, and the Bishop sent the case to the Arches Court by letters of Request, which recited the Commission, with the extracts set out in it, and the Commissioners' Report, which contained the same extracts, requesting the Court to cite the accused Clergyman to answer a charge of publishing heretical doctrines in the Work named and specified in the Commission. A Citation was issued, which recited the Letters of Request in full with the extracts appearing in it. Articles were then filed, which charged the Defendant with publishing, in addition to the heretical doctrines appearing in the extracts set out in the Commission, Letters of Request, and Citation, other heretical doctrines of a distinct kind impugning the 29th Article of Religion in passages taken from the same Works, but not before set out or indicated, save under a general allegation that the works contained "other statements," which latter doctrines, if asserted as alleged, were so by reference to Works of other authors:—*Held*, by the Judicial Committee on appeal, upon a motion to admit additional passages, the Articles must be reformed by striking out the charge of publishing the latter doctrines impugning the 29th Article of Religion, on the ground that the passages cited or referred to as the opinions of other authors were not sufficiently shewn to have been adopted by the Defendant, in the passages extracted from his

ECCLESIASTICAL LAW—*continued.*

Works to justify and support such charge.—The doctrine of the Real Presence is not a doctrine in contravention of the 29th Article of Religion.—The rules regarding the frame and substance of Articles of Charge for heresy against a Clergyman laid down in *Williams* v. *The Bishop of Salisbury* (2 Moore's P. C. Cases (N.S.) 375) referred to and approved. SHEPPARD *v.* BENNETT (first appeal) - - - - - 350

2. —— Articles of Charge against a Clergyman for affirming and maintaining in Works printed and published by him:—First, that in the Sacrament of the Lord's Supper there is an actual presence of the true Body and Blood of our Lord in the Consecrated Bread and Wine, by virtue of and upon the Consecration, without or external to the Communicant, irrespective of the faith and worthiness of the Communicant, and separately from the act of reception by the Communicant.—Second, that the Communion Table is an Altar of Sacrifice, at which the Priest appears in a sacerdotal position at the Celebration of the Holy Communion, and that at such Celebration there is a great sacrifice or offering of our Lord by the ministering Priest, in which the mediation of our Lord ascends from the Altar to plead for the sins of men; and Third,—That adoration is due to Christ present upon the Altar or Communion Table of Churches, in the Sacrament, under the form of Bread and Wine, on the ground that under their veil is the Body and Blood of our Lord.—Upon examination of the passages extracted from the publications in which it was alleged these doctrines were maintained, the Judicial Committee were of opinion that, though the language used was both rash and inconsiderate, yet that the passages extracted did not, in terms, sufficiently contradict the Articles and Formularies of the Church as to render the Clerk proceeded against subject to a criminal and penal proceeding; but having reference to the doctrine to which the above three charges related as contained in the 4th, 28th, 29th, and 31st Articles of Religion and the Church Catechism and the language used by the Defendant, the Judicial Committee declared—I. That the Church of England, in her Articles and Formularies and Catechism, holds and teaches affirmatively that in the Lord's Supper the Body and Blood of Christ are given to, taken, and received by the faithful Communicant. She implies, therefore, to that extent a presence of Christ in the Ordinance to the soul of the worthy recipient. As to the mode of this presence, she affirms nothing except that the "Body of Christ is given, taken, and eaten in the Supper, only after a heavenly and spiritual manner," and that "the mean whereby the Body of Christ is received and eaten in the Supper is faith." (Article xxviii.) Any other Presence than this—any Presence which is not a Presence to the soul of the faithful receiver—the Church does not by her Articles or Formularies affirm, or require her Ministers to accept; and consequently the maintaining by a Clergyman of a "real actual objective" Presence of our Lord in the Sacrament of the Holy Communion, "upon the Altar under the form of Bread and Wine," was not, in the affirmance a doctrine so contradictory or repugnant to the Articles and Formularies of the Church as to

ECCLESIASTICAL LAW—*continued.*

be properly made the ground of a Criminal charge against him, and that a Clergyman cannot be condemned for maintaining that the change in 1662 of the word "corporal" for the words "real and essential" in the Declaration of Kneeling, appended to the service of the Holy Communion, was an intentional substitution, implying that there may be a real or essential Presence, as distinguished from a corporal Presence, if he does not in terms allege a corporal Presence of the natural Body of Christ in the Elements, or that the Body of Christ is present in a "corporal" or "natural" manner.—II. That it having been decided in *Westerton* v. *Liddell* (Special Report by E. F. Moore, 1857) that the change of the view taken of the Sacrament of the Lord's Supper, "as shewn by comparison of the present Communion Office with that of the first Prayer Book of Edward VI. and the Canon of the Mass in the *Sarum* Missal," naturally called for a corresponding change in the Altar; that it was no longer to be an Altar of Sacrifice, but merely a Table at which the Communicants were to partake of the Lord's Supper; and that the 31st Article of Religion, after laying down the proposition (which is adopted also in the Prayer of Consecration) that "the Offering of Christ once made is that perfect redemption, propitiation, and satisfaction, for all the sins of the whole world, both original and actual," and that "there is none other satisfaction for sin but that alone," proceeds on the strength of these propositions to say that "the Sacrifices of Masses, in which it was commonly said that the Priest did offer Christ for the quick and the dead, to have remission of pain or guilt, were blasphemous fables and dangerous deceits."—It is not lawful for a Clergyman to contradict, expressly or by inference, either the proposition which forms the first part of the 31st Article or any proposition plainly deducible from the condemnation of propitiatory masses, which forms the second part of it, and is stated as a corollary to the first.—Neither is it lawful for a Clergyman to teach that the Sacrifice, or offering of Christ upon the Cross, or the redemption, propitiation, or satisfaction wrought by it, is or can be repeated in the Ordinance of the Lord's Supper; nor that in the Ordinance of the Lord's Supper there is, or can be, any Sacrifice or Offering of Christ which is efficacious to procure the remission of the guilt or punishment of sins. The word "Sacrifice" has been applied to the Lord's Supper by Divines of eminence, not in the sense of a true *propitiatory* or a living Sacrifice, effectual as a satisfaction for sin, but of a rite which calls to remembrance and represents before God that one true Sacrifice.—III. That the doctrine that Adoration is due to the consecrated elements is contrary to law, and has been condemned: *Martin* v. *Mackonochie* (Law Rep. 2 P. C. 365). The Church of England has forbidden all acts of adoration to the Sacrament, understanding by that the Consecrated Elements. She has been careful to exclude any act of adoration on the part of the Minister, at or after the Consecration of the Elements, and to explain the posture of kneeling prescribed by the Rubric. The 28th Article lays down that "the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or wor-

ECCLESIASTICAL LAW—*continued.*
shipped." In the 25th Article it is affirmed that "the Sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them." In the absence of a charge of any outward Act of Adoration, a general charge, *held*, in the circumstances, not sufficient to support a penal proceeding. The successive alterations and omissions in the Book of Common Prayer, by which words or passages, inculcating particular doctrines, or assuming a belief in them, have been struck out, are evidence that the Church has ceased to affirm those doctrines: but the effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, and not that it becomes unlawful to maintain them. Though it has been the practice of the Arches Court, on the remission of Articles directed on appeal to be reformed as to a particular charge, for the Judge himself to reform the Articles by striking out such parts of the Articles as he conceives to be within the original decree appealed from and confirmed, notwithstanding objections made by the Promoter of the cause; such practices, as tending to create delay, if not a miscarriage of justice, if the Judge should erroneously strike out parts not affected by the Order in Council, fought to be discontinued; and before an appeal from any Decree directing the reformation of Articles is perfected, the actual reformation which appears to the Judge to be required should be made by him and appear on the face of the Decree that the very passages directed to be omitted may be brought under the judgment of the Court of Appeal. SHEPPARD *v.* BENNETT (Second Appeal) - - - - 371

ELECTION OF HEIR—HOW REGULATED BY THE CODE CIVIL: *See* COLONIAL LAW. 10.

EVIDENCE.] The Defendant, after the publication of a libel, and before the action was brought, destroyed the Letter containing the libellous words:—*Held*, that as the defamatory writing was not in existence, secondary evidence of the contents of the Letter by Witnesses who heard it read was admissible, but that the actual words used as laid in the declaration must be proved, and not the substance or impression the Witnesses received of the words, as otherwise the Witnesses, and not the Court or jury, would be made the judges of what was a libel.—Before the declaration was filed the Plaintiff gave notice of his intention to move for a Rule for the production of the Letter containing the words of the Libel as set out in the declaration. An affidavit in answer by the Defendant, stated that he, the Defendant, had destroyed the Letter, but made no objection to the terms of the alleged libel set out in the Plaintiff's affidavit:—*Held*, that the Plaintiff's affidavit being merely for the purpose of the production of the Letter, was not admissible as evidence to prove the words of the libel. RAINY *v.* BRAVO - - - - - 287

2. —— Depositions taken on Oath before Trial are admissible on a Trial for Felony. REG. *v.* COOTE - - - - - 599

EVIDENCE OF PATERNITY: *See* COLONIAL LAW. 6.

EXTENSION OF TERM OF LETTERS PATENT: *See* PATENT.

FELONY: *See* COLONIAL LAW. 11.

FENCING ACT (AUSTRALIA) No. VI. OF 1865: *See* COLONIAL LAW. 9.

FOREIGN ENLISTMENT ACT.] A French Ship of War captured in the English Channel a Prussian Ship as prize of War. A prize crew under a French Naval Officer was put on board. The prize Ship being driven by stress of weather into the *Downs*, anchored within British Waters, and after lying there two days the French Consul at *Dover*, engaged an English Steam-tug then lying in the *Downs* to tow the captured ship from British Waters to a port of the captors, and under such Agreement the Tug towed the prize to *Dunkirk Roads*. In a suit instituted on behalf of the Crown for condemnation of the Tug for violation of the *Foreign Enlistment Act* of 1870 (33 & 34 Vict. c. 90) the Judge of the Court of Admiralty *Held*, that no offence had been committed under that Statute, as the Steam Tug was not employed in the Military or Naval Service of *France*, as declared by the 8th section of the Act, and dismissed the Suit, condemning the Crown in Costs. On appeal, *Held*, by the Judicial Committee (reversing the decree) that the engagement by the Owners of the Tug for the express purpose of towing the detached prize crew, its prisoners and prize Vessel, speedily and safely into French Waters, where the prisoners and prize would be taken charge of by the French authorities, and the prize crew set free, was despatching a Ship within the meaning of sect. 8 of the *Foreign Enlistment Act* of 1870, for the purpose of taking part in the Naval Service of a belligerent, and condemned the Tug as a forfeiture to the Crown. THE "GAUNTLET" - - - - 184

FOREIGN JUDGMENT.] A foreign judgment of a Competent Court is conclusive, and not open to examination by another Court unless the judgment impeached carries on the face of it manifest error: as if it is shewn to have been obtained by fraud, or wanting in the condition of natural justice. Such judgment cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*. MESSINA *v.* PETROCOCCHINO [144

FOREIGN PATENT.] Principles regulating the exercise of discretion by the Judicial Committee in granting an extension of Patents previously patented abroad. *In re* JOHNSON'S PATENT 75

—— *See* PATENT. 3.

FRAUD CHARGED BY BILL AND NOT PROVED: *See* PLEADING. 3.

FREIGHT.] When put an end to by War. THE "TEUTONIA" - - - - - 171

2. —— Subsequent freight earned after Bottomry Bond became absolute. THE "STAFFORDSHIRE" - - - - - - 194

FRENCH LAW IN FORCE AT MAURITIUS: *See* COLONIAL LAW. 10.

GARNISHEE: *See* COLONIAL LAW. 5.

GIFT INTER VIVOS: *See* COLONIAL LAW. 6, 7.

GRATUITOUS BAILEE: *See* Bailee.

GREEK CONSULAR COURT AT CONSTANTINOPLE: *See* Bottomry Bond. 1; Foreign Judgment.

GUARDIAN AND WARD: *See* Infant.

HERESY: *See* Ecclesiastical Law. 2.

HÉRITIERS: *See* Colonial Law. 7.

HUSBAND AND WIFE: *See* Colonial Law. 4.

HYPOTHECATION OF SUBSEQUENT FREIGHT: *See* Bottomry Bond. 2.

ILLEGITIMATE CHILD LEGITIMATIZED BY SUBSEQUENT MARRIAGE: *See* Colonial Law. 6, 10.

IMMINENTE BELLO: *See* Breach of Contract by Shipowner.

INCORPORATION OF JOINT STOCK COMPANY: *See* Partnership. 1.

INDIA, LAW OF: *See* Divorce; Infant.

INDIAN BAR: *See* Barrister.

INEVITABLE ACCIDENT is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. The "Marpesia" - - 212

INFANT.] A child born in *India*, whose Father was an European British Subject and a Christian, must be presumed to have the Father's religion, and his corresponding civil and social *status*, and it is the duty of a Guardian to bring up his Ward in his Father's religion.—An Infant, the child of a Christian Father and the issue of a Christian marriage, was left, by the death of her Father, of very tender age, and brought up by her mother as a Christian during her early youth. Her Mother, after cohabiting with a man having a wife, and professing the Christian religion, became with him, a Mahommedan, for the purpose, as it appeared, of giving legal effect to a Mohammedan marriage between them, but which alleged marriage was not proved to have been duly celebrated. —The Infant, after attaining the age of fourteen years, and being with her Mother, professed a desire to become a Mahommedan in religion, and adopted the Mahommedan mode of life. The Courts in *India* having been applied to, under the circumstances, by her relatives, to remove the Infant from the custody of her Mother, made an Order under the provisions of the Acts No. XL. of 1858 and IX. of 1861, and placed the Infant under a Christian guardian. Such Order, on appeal, confirmed by the Judicial Committee. Skinner *v.* Orde - - - - - 60

INHERITANCE: *See* Colonial Law. 6.

INVENTION COMMUNICATED BY FOREIGN INVENTOR: *See* Patent. 1.

JERSEY, LAW OF: *See* Colonial Law. 6.

JOINT STOCK COMPANY: *See* Partnership. 1.

JURISDICTION.] 1. Her Majesty's Supreme Court for *China* and *Japan*, established by Order in Council of the 9th of March, 1865, under the Treaty of *Tientsin*, having cognizance of all questions in regard to rights, whether of property, or of persons, arising between British subjects "resident in or resorting to the dominions of the Emperor of *China*," has jurisdiction to try an action for alleged false representations. Hart *v.* Gumpach - - - - - 439

2. —— **OF JUDICIAL COMMITTEE**, under statute 15 & 16 Vict. c. 83, s. 25, to extend term of English Patent when a Foreign Patent for the same invention has expired. *In re* Blake's Patent - - - - - - 535

See also Foreign Judgment; Maritime Lien.

LACHES: *See* Bailee.

LEAVE TO APPEAL: *See* Appeal.

LEGACY, power of Testator *quotité disponible* by Code Civil: *See* Colonial Law. 10.

LEGITIMATION PER SUBSEQUENS MATRIMONIUM: *See* Colonial Law. 6, 10.

LETTERS OF REQUEST: *See* Ecclesiastical Law. 1.

LETTERS PATENT: *See* Patent.

LEX FORI: *See* Bottomry Bond. 1.

LIBEL.] 1. In an action of libel the defamatory words set out in the declaration must be proved as laid, and it is a fatal variance if the words as alleged are materially qualified by evidence of words not contained in the declaration although such words as qualified are still libellous. Rainy *v.* Bravo - - - - - 287

2. —— In an action brought in Her Majesty's Supreme Court for *China* and *Japan*, for false representations made by the Defendant, occupying an official post in the service of the Emperor of *China* to the *Tsung-li-Yamên*, the head of the Foreign Board at *Peking*, respecting the conduct of the Plaintiff as a Professor in the College established there, which led to his dismissal by that Board, the alleged misrepresentations being, that the Plaintiff had asked to be relieved from his duties and declined to perform them, and that he had absented himself from *Peking* at a time when his active services might be required at the College. The Defendant, in reply, denied that he had made any false representations, and asserted that such representations as he had made were contained in a report made by him in the course of his duty as an officer of the Chinese Government. The Judge, in his summing-up, directed the Jury that, whether the Defendant had made false representations, and the Chinese Government had dismissed the Plaintiff in consequence, was a thing specially for the Jury to consider, and whether the representations were warranted by facts. The Jury found for the Plaintiff, and gave large damages. A rule *nisi* was afterwards obtained for a nonsuit or New Trial, on the ground of misdirection, and that the verdict was against evidence. The misdirections complained of were (1), that the Judge did not direct the Jury that the representations were privileged; (2), not leaving to the Jury the question, whether the representations were wilfully false, and (3), that there was no evidence to go to the jury that the representations were wilfully false. The Supreme Court discharged the rule. On appeal:—*Held*, by the Judicial Committee that the Judge's summing-up was erroneous, that the representations complained of were privileged communications, that the Judge ought

LIBEL—*continued.*
to have explained to the Jury the relation and position of the parties, and have told them that the action would not lie, if the statements were made honestly and in a belief of their truth without proof of express malice, and not whether they were warranted in fact, and that the burden was on the Plaintiff to prove that they were not so made. HART *v.* GUMPACH - - - 439

2. —— The Charge of a Bishop to his Clergy in Convocation is in the ordinary sense of the term, a privileged communication; on the well-known principle that a communication made *bonâ fide* upon any subject-matter in which the party has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which without that privilege would be defamatory and actionable; provided that the occasion on which the communication is made rebuts the *primâ facie* inference of malice in fact arising from a statement prejudicial to the character of the Plaintiff, and the onus is upon him to prove that there was actual malice, that the Defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made. So *held*, where the Bishop of *Sodor and Man*, in a charge to his Clergy in Convocation, commented on a speech made by a Barrister in his character of an Advocate instructed to oppose a Bill before the *House of Keys* promoted by the Government, vesting additional Ecclesiastical patronage in the Bishop, in which he impugned the conduct of the Bishop, and attributed to him motives and conduct unworthy of his character and position:—*Held*, also, that the circumstances of the case warranted the Bishop in sending such charge to a Newspaper for publication; and that such course being in self-defence rebutted any presumption of malice on the part of the Bishop. *Somerville* v. *Hawkins* (10 C. B. 583) and *Spill* v. *Maule* (Law Rep. 4 Ex. 232) followed. —The cases of *Whiteley* v. *Adams* (15 C. B. (N.S.) 392) and *Wright* v. *Woodgate* (2 C. M. & R. 573) recognized and affirmed. LAUGHTON *v.* THE BISHOP OF SODOR AND MAN - - - 495

LIEN: *See* MARITIME LIEN; SEPARATE ESTATE OF MARRIED WOMAN.

LIMITATION OF SUITS ACT (INDIA) No. XIV. OF 1859: *See* DIVORCE.

LIMITED LIABILITY: *See* PARTNERSHIP. 1.

LOWER CANADA, LAW OF: *See* COLONIAL LAW. 1, 2, 3, 5, 7, 8.

MALICE, PROOF OF, ACTUAL OR EXPRESSED: *See* LIBEL.

MARITIME LIEN.] The jurisdiction conferred on the High Court of Admiralty by sect. 5 of the *Admiralty Court Act*, 1861 (24 Vict. c. 10) "over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs" does not create a maritime lien, or render the ship chargeable for necessaries.—A British Colonial Vessel was mortgaged by her Owners to *B.* The Mortgage was duly registered under the *Merchant Shipping Act*, 1854. In February, 1868, whilst lying in the Port of *London*, the Appellants, on the order of the Master, did work and furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, *B.* executed an instrument transferring the Mortgage to the Respondent. This transfer was without valuable consideration, and was not registered, being made to enable the Respondent to take charge of the Ship for *B.*, the mortgagee. In the same month the Respondent took possession of the Ship. The Appellants having instituted a suit against the Ship to recover the amount due to them for the work and supplies, the Respondent intervened. At the time of the institution of the suit the ship was under the arrest of the Court, at the instance of two of her crew who had instituted a cause of wages; the owners of the Ship were domiciled in *Nova Scotia*. The Ship having been sold, the proceeds were found insufficient to satisfy the claim of the Appellants (the material men) and the Mortgage Debt:—*Held* (affirming the judgment of the Court below) that the Respondent, the Assignee of the Mortgagee, was entitled to have his Mortgage Debt satisfied before the Appellants were paid the amount of their claim. THE "TWO ELLENS" - - 161

MARRIED WOMAN, DEBTS OF: *See* SEPARATE ESTATE OF MARRIED WOMAN.

MASTER OF SHIP, authority of, to sell goods of absent Owner; duty of Master to communicate with Owner if practicable. THE AUSTRALASIAN STEAM NAVIGATION COMPANY *v.* MORSE - 222

MATERIAL MEN: *See* MARITIME LIEN.

MAURITIUS, LAW OF: *See* COLONIAL LAW. 10.

MISDIRECTION: *See* LIBEL. 1.

MONITION, DISOBEDIENCE OF: *See* CONTEMPT.

MORTGAGE OF SHIP: *See* MARITIME LIEN.

MUTUAL WILL, power by Roman-Dutch law of surviving spouse to revoke. DENYSSEN *v.* MOSTERT [236

NATAL, LAW OF: *See* PARTNERSHIP. 1.

NAVIGATION: *See* SHIP AND SHIPPING.

NECESSARIES: *See* MARITIME LIEN.

NECESSITY, WHAT CONSTITUTES: *See* CARGO.

NEGLIGENCE: *See* BAILEE; ONUS PROBANDI; SHIP AND SHIPPING.

NEW TRIAL: *See* COLONIAL LAW. 11.

NORMAN LAW RESCINDED IN JERSEY: *See* COLONIAL LAW. 6.

NOTICE by Master of Ship to Owner of Goods necessary, when practicable, before resorting to sale. THE AUSTRALASIAN STEAM NAVIGATION COMPANY *v.* MORSE - - - - 222

NUNCUPATIVE WILL: *See* COLONIAL LAW. 3.

ONUS PROBANDI.] *Held*, affirming the principles laid down in *The Bolina* (3 Notes of Cases, 210), that where in a cause of collision the defence of inevitable accident is raised the *onus* of proof lies, in the first instance, on those who bring the suit against the Vessel, and seek to be indemnified for damage sustained; and does not attach to the Vessel proceeded against until a *primâ facie* case of negligence and want of due seamanship is shewn. THE "MARPESIA" - - - 212

PARTNERSHIP.] In a suit brought by the Official Manager of a Partnership and Joint Stock Company appointed under the *Natal* Winding-up Ordinance, No. 19 of 1866, against a registered Shareholder, for an instalment on a Call made by Order of the Supreme Court, the Defendant pleaded Ordinance No. 4 of 1849, of the Colony, under the provisions of which he alleged the company was incorporated, and that having paid his shares in full he was not liable for any debts due or incurred by the Company. The Supreme Court of *Natal held*, upon the construction of the Deed of Agreement constituting the Company and the Ordinance No. 4 of 1849, enabling the Company to carry the same into effect, that such Ordinance did not incorporate the Company so as to exempt the Shareholders from individual liability in respect of the debts of the Company, but only conferred on them facilities for carrying on the business of the Company, and the objects of the original Deed whereby it was constituted. Such construction and decision confirmed, on appeal, by the Judicial Committee. ALDRIDGE *v.* CATO - - - - - 313

2. —— Agreement in writing entered into between *W. & Co.*, British Merchants, carrying on business at *Calcutta* with a Hindoo Rajah, by which, in consideration of moneys already advanced, and which might be thereafter advanced by the Rajah to them, they agreed to carry on the business subject to the control of the Rajah in several particulars, stipulating that the Rajah should receive a commission of twenty per cent. on all profits made by the Firm until the whole amount of the debt due to him should be paid off with twelve per cent. interest upon all cash advances which had been or might be thereafter made by him to the Firm. Further advances having been made by the Rajah to the Firm, *W. & Co.* executed to him a mortgage of certain Tea plantations, to secure the then amount of his advances, under which the Rajah by a Deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the Rajah, and though he was credited in the books of the Firm with a considerable sum, that sum was never received by him, and was afterwards written back in the books of the Firm. The Rajah did not interfere or exercise any such control in the business as to make him an ostensible Partner in the Firm:—*Held*, that having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of a business made the Participant liable as a Partner to third parties; and looking at the whole scope of the agreement, the primary object was to give security to the Rajah as a Creditor of the Firm of *W. & Co.*, and that the participation given him in the net profits of the business was not sufficient to establish a partnership between *W. & Co.* and the Rajah as regarded third parties.—Although a right to participate in the profits of a Trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption—not of law, but of fact—be enforced, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.—The cases of *Cox* v. *Hickman* (8 H. L. C. 268) and *Bullen* v. *Sharpe* (Law Rep. 1 C. P. 86) referred to and acted on.—In the absence of any law or established custom existing in *India* in respect to partnership transactions, the law of *England* is to be resorted to for principles and rules to guide the Courts. At the same time the usages of trade and habits of business of the Indian Community, so far as they may be peculiar or differ from those in *England*, are to be taken into consideration. MOLLWO, MARCH, & Co. *v.* THE COURT OF WARDS - - - 419

PATENT: *See* PRACTICE. 1, 2.

1. Exposition of the principles which regulate the Judicial Committee in recommending the Crown to extend the term of Letters Patent of an invention, consisting of a communication from a Foreigner residing abroad, who had, previously to the English Patent taken out a Patent for the same invention in a Foreign State. *In re* JOHNSON'S PATENT - - - - - 75

2. —— Upon the construction of Sect. 25 of 15 & 16 Vict. c. 83:—*Held*, that that section does not apply where an English Patent is taken out in this country, before a Patent for the same invention is obtained in a foreign country.—A Patent by American subjects was taken out in this country and shortly afterwards in *America* and *France* for the same invention. After the expiration of the French Patent, and within a few months of the expiration of the American Patent, application was made for a prolongation of the English Patent. Such application refused, as the Judicial Committee would not, on the ground of general policy, recommend a renewal of the English Patent after the French Patent had been allowed to expire. *In re* WINAN'S PATENT - - 93

3. —— A Patent was first taken out in *America*, afterwards in *England*, and two days after the date of the English Patent the invention was patented in *France*. The French Patent was allowed to drop. On an application for prolongation of the English Patent:—*Held*, following *Winan's Patent* (Law Rep. 4 P. C. 93), that although the Judicial Committee might have jurisdiction under the 25th section of the 15 & 16 Vict. c. 83, to entertain the application, yet, on the ground of public policy, as the French Patent had been allowed to expire, they would not in the exercise of the discretion vested in them recommend the extension of the term of the English Patent. *In re* BLAKE'S PATENT - - 535

4. —— In circumstances shewing a want of adequate remuneration, an extension of the term of Letters Patent granted for six years. In estimating the profits derived from the Patent, the Judicial Committee will take into consideration a deduction from the profits of the Patent for the personal expenses of the Patentee, for the exclusive devotion of his time in bringing the Patent into practical operation and public notice. *In re* CARR'S PATENT - - - - 539

5. —— Petition for extension of term of Letters Patent, effect of omission to state fairly and fully all matters relating to the Patent. *In re* PITMAN'S PATENT - - - - 84

PENALTY.] Where a Statute inflicts a penalty for not doing an act provided for, the penalty

PENALTY—*continued.*

enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination. The "Hibernian" - 511

PLEADING.] 1. If a Plaintiff in a collision suit intends to rely upon a particular act of negligence by the Defendant, he is bound specifically to allege that act in his pleadings, and it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not state clearly such particular act; as it is likely to mislead the Defendant, and prevent his being prepared to meet that particular case. The "Marpesia" - - - - - - - 212

2. —— *Semble.* Where the rules of pleading in a Court in a Foreign Country having jurisdiction over British Subjects, are by petition and answer, the several paragraphs of the answer can be read together and not as in English pleadings treated as separate pleas. Hart *v.* Gumpach 439

3. —— If the relief sought by the Bill is based on fraud, the failure to prove it is fatal; but if by striking out of the Bill the charge of fraud there is sufficient equity stated and proved, and the charge of fraud is only subsidiary, it is a matter only affecting costs. The London Chartered Bank of Australia *v.* Lemprière 572

POWER OF APPOINTMENT BY MARRIED WOMAN—Exercise of: *See* Separate Estate of Married Woman.

PRACTICE: *See also* Appeal.

1. —— As the recommendation to the Crown for the prolongation of the term of Letters Patent is a matter of discretion in the Judicial Committee, it is imperatively necessary that the petition for such prolongation should state fairly and fully everything relating to the Patent; an omission to do so is fatal to the application.—Where the petition omitted to state that the Patent was, in fact, a communication from a Foreigner living abroad, who had previously to the English patent patented the same invention in *America*, and that the American Patent had expired, though afterwards renewed in *America*, the Judicial Committee, in the circumstances, refused the application. *In re* Pitman's Patent - - - 84

2. —— Account of profits and loss filed by a Patentee on his application for a prolongation of the term of Letters Patent, being *primâ facie* unsatisfactory, the Judicial Committee directed the question of accounts to be taken before considering the merits of the invention.—As the accounts were not satisfactorily explained, the application for a prolongation was refused. *In re* Wield's Patent - - - - - - 89

3. —— The Appellate Court will not interfere with the discretion of a Judge on a question of procedure of a Colonial Court. Rainy *v.* Bravo [287

4. —— It is too late for the Respondent at the hearing to take an objection to the competency of the appeal on the ground that the subject matter of the suit did not involve the prescribed appealable value; such objection not having been taken in the Respondent's case. The proper course would have been for the Respondent to move in

PRACTICE—*continued.*

the first instance to dismiss the appeal on that ground. Aldridge *v.* Cato - - 313

5. —— Pending an appeal, the Respondent died intestate leaving children, who by reason of litigation respecting their Father's right of succession, objected to be made Respondents. The Judicial Committee directed the petition to revive, to stand over, with liberty to apply to the Royal Court of *Jersey* to appoint a proper person to represent the estate. The Royal Court appointed the Viscount of the Island as Official representative of the estate, and the appeal was revived in his name. La Cloche *v.* La Cloche [325

6. —— Although as a general rule, the Judicial Committee will not reverse the concurrent findings of Courts in *India* on a question of fact, yet there may be circumstances to take such findings out of the scope of the general rule, as in the case of a divorce *à vinculo*, in which, by Act No. IV. of 1869, sect. 17, a decree made by the Court of First Instance is only binding on confirmation by the Chief Court, which decree is not to be considered as a separate judgment. Hay *v.* Gordon - - - - - 337

PRACTICE IN THE ADMIRALTY COURTS—An objection to a suit on the ground of the non-production, or insufficient proof, of a proxy, is a preliminary objection to be taken on motion and not by protest, and the proper course for the Vice-Admiralty Court, in such circumstances, is to stay the proceedings for the production of proof, until sufficient evidence is produced, and not to allow the cause to proceed to a hearing, and then dismiss the suit on the ground that there was no sufficient proof of the proxy. The "Euxine" 8

PRACTICE IN THE ARCHES COURT ON REMISSION OF ARTICLES: *See* Ecclesiastical Law. 2.

PRIORITY: *See* Maritime Lien.

PRIVILEGED COMMUNICATION: *See* Libel.

PROBATE, GRANT OF, NOT CONCLUSIVE BY LAW OF LOWER CANADA: *See* Colonial Law. 3.

PROCEDURE—The principles relating to partnership transactions which guide the Courts in India. *See* Partnership. 2.

PROFESSIONAL MISCONDUCT: *See* Barrister.

PROFITS—Allowance to Patentee in taking account of profits for loss of time in bringing Patent into public use. *In re* Carr's Patent - 539

PROLONGATION OF TERM OF LETTERS PATENT: *See* Patent.

PROXY—It is the practice in the High Court of Admiralty as to Proxies for Proctors to proceed without the exhibition of a Proxy until called upon to produce it; and when called on they satisfy the requisite requirement by stating the names of the parties for whom they appear.—Such practice in this respect is the same in the Vice-Admiralty Courts abroad, where Proctors are not bound to do more under s. 40 of the Rules and Regulations made in pursuance of the Statute, 2 Will. 4, c. 51, s. 1, and Order in Council of the 27th of June, 1832, unless called upon to do so by

PROXY—*continued.*
an Order of the Court. The production of a Proxy which on the face of it is duly signed and sealed is a sufficient compliance with an Order of the Court to produce the Proxy, without proof of the handwriting of the subscribing witnesses: the onus of proof of the insufficiency of the proxy, if questioned, is on the party impeaching it. The "Euxine" - - - - - - 8

PUBLIC POLICY: *See* Patent. 1, 2.

PUBLIC USE: *See* Patent. 2.

QUESTION OF FACT: *See* Practice. 6.

QUOTITE DISPONIBLE: *See* Colonial Law. 10.

RAILWAY: *See* Colonial Law. 2.

REAL PRESENCE: *See* Ecclesiastical Law. 2.

REGISTRATION OF TRANSFER OF SHIP: *See* Maritime Lien.

RELIGIOUS EDUCATION OF INFANT ORDERED TO BE BROUGHT UP IN THE RELIGION OF THE FATHER. Skinner *v.* Orde 60

RETOUR: *See* Colonial Law. 7.

REVIVOR OF APPEAL: *See* Practice. 5.

REVOCATION BY SURVIVING SPOUSE OF MUTUAL WILL. Denyssen *v.* Mostert [236

ROMAN-DUTCH LAW: *See* Colonial Law. 4.

RULES AND REGULATIONS FOR PREVENTING COLLISIONS BY STEAM SHIPS: *See* Ship and Shipping.

RULES AND REGULATIONS AS TO VICE-ADMIRALTY COURTS ABROAD: *See* Proxy.

SACRAMENT: *See* Ecclesiastical Law. 2.

SALE OF GOODS OF AN ABSENT OWNER BY MASTER OF SHIP—When and under what circumstances justifiable. The Australasian Steam Navigation Company *v.* Morse - - 222

SECONDARY EVIDENCE: *See* Evidence.

SEPARATE ESTATE OF MARRIED WOMAN—The property of a married woman settled by an ante-nuptial Settlement for her separate use for life, with remainder as she should by Deed or Will appoint, with remainder in failure of appointment to her Executors or Administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire *corpus* in her for all purposes. —*A.*, a Widow and the administratrix of her deceased Husband (who had died intestate), and entitled to Dower as to his real estate, and to a third of his personal estate, being about to contract a second marriage, executed with her intended Husband a Settlement whereby she settled the estate she was so possessed of and entitled to, to her sole and separate use, with power of appointment by Deed or Will, and with his consent gave a Letter instructing her Bankers to keep separate accounts, and to consider any private overdraft by her on her own account, secured by the administrative deposits in their hands. At this time two sums of £6000 and £8000 were in deposit on such account, and subsequently various other sums were, from time to time, paid in by her to the same account, and placed at interest with the

SEPARATE ESTATE OF MARRIED WOMAN—*continued.*
Bank, who allowed her to overdraw her private account on the strength of the arrangement so made.—By her Will she executed the power of appointment reserved to her by the Settlement, and having at the time of her death overdrawn her private account to a considerable amount the Bankers claimed, as against the parties interested under the Will, to retain the sums so paid into their hands on account of the administrative account, and especially the sums of £6000 and £8000 so deposited with them in payment of the sums due to them on account of the overdrafts made by her on her private account, and brought a suit in the Supreme Court of the Colony of *Victoria* to enforce such lien. The Supreme Court dismissed the suit:—*Held* by the Judicial Committee, reversing such decision, that whether or not the Bankers had notice of the Settlement (which fact was uncertain) the letter of instruction to them by *A.* was a valid execution of the right reserved by her, as regarded the two sums of £6000 and £8000 then in their hands, and in the absence of fraud gave the Bankers a lien on those sums for any future overdraft that might be made in accordance with the terms of such Letter.—The dictum of Lord Justice *Turner* in the case of *Johnson* v. *Gallagher* (3 D. F. & J. 494) as to the liability of the separate estate of a married woman for debts contracted with reference to such estate approved and adopted. The case of *Shattock* v. *Shattock* (Law Rep. 2 Eq. 182) dissented from. The London Chartered Bank of Australia *v.* Lemprière - - - 572

SHIP AGENT: *See* Bottomry Bond. 2.

SHIP AND SHIPPING.] 1. Article 16 of the Admiralty Regulations for preventing Collisions at Sea only applies when there is a continuous approaching of two Steamships.—When two Ships under Steam "are meeting end on, or nearly end on, so as to involve risk of collision," as provided for in Article 13, and one of them at a proper distance, ports her helm sufficiently to put her on a course which will carry her clear of the other, and enable her to pass on the port side, she thereby determines the risk, and is not approaching another Ship so as "to involve risk of collision," within the meaning of Article 16, and is not bound to slacken speed or stop. The "Jesmond" and The "Earl of Elgin" - - - - 1

2. —— Two Sailing Vessels approaching stem on in such a manner as that under the Sailing Rules each would be bound to port, being in a dense fog, only sighted each other at a distance of about 200 yards. The Defendants' Vessel having been close hauled on the port tack, was then preparing to go about, and had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The Plaintiffs' petition alleged that the Defendants' vessel neglected to port, and it was stated, in answer to a question by the Judge of the Admiralty Court, that the head sheets of the Defendants' Vessel were not again hauled aft. On this evidence that Vessel was held to blame by the Admiralty Court, on the ground

SHIP AND SHIPPING—*continued.*

that she had not executed all the proper manœuvres which she might have executed after sighting the other Vessel:—*Held* (reversing the decision of the Admiralty Court), that the collision was the result of an inevitable accident, the Defendants' Vessel having done all that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; and that the Plaintiffs, if they meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in their petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission.—It is a rule in the Admiralty Court in cases where a collision is found to be the result of inevitable accident, to make no order as to costs, unless it can be shewn that the suit was brought unreasonably and without sufficient *primâ facie* grounds. This rule followed by the Appellate Court. *The London* (Br. & L. 82) approved. THE "MARPESIA" 212

3. —— It is the general practice for Steam Vessels going down the River *Thames* to keep on the North side. If, therefore, a Vessel rounding a bend on the north side, under a port helm, on her way up the River, sees the red light of one rounding the same bend on her way down, over her starboard bow, and nearer the North side than she is herself, she is not justified in supposing that the Vessel coming down will cross her North and pass her on her port side.—Vessels under those circumstances are not crossing Vessels within the meaning of the 14th Article of the Steering and Sailing Rules.—The rule laid down in *The Velocity* (Law Rep. 3 P. C. 44) followed. THE "RANGER" - - - 519

4. —— Article 16 of the Rules and Regulations for preventing Collisions at Sea provides that "every Steamship when approaching another Ship so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse; and every Steamship shall in a fog go at a moderate speed. A Steamship navigating in a fog at a moderate speed hearing a whistle sounded many times, indicating that a Steamship was approaching her, and had come very near to her, so near that if the Vessels had then been stopped they would have been within hailing distance, is bound under the 16th Article not only to stop the motion of her engines, but to reverse them, so as to stop the motion of the Vessel, and ought not to wait until the Vessels sight each other, when such a manœuvre may be too late. THE "FRANKLAND" [529

SIERRA LEONE ORDINANCE, No. 4 OF 1866: *See* TRIAL.

SOUTH AUSTRALIA, LAW OF; *See* COLONIAL LAW. 9.

STALE SUIT: *See* DIVORCE.

STATUTES, CONSTRUCTION OF: *See* CONSTRUCTION.

STEERING AND SAILING RULES: *See* SHIP AND SHIPPING.

SUBSTITUTION: *See* COLONIAL LAW. 7.

SUCCESSION: *See* COLONIAL LAW. 6, 10.

SUSPENSION OF BARRISTER FROM PRACTICE: *See* BARRISTER.

SUSPENSION AB OFFICIO ET À BENEFICO: *See* CONTEMPT.

TESTAMENTARY PAPER: *See* COLONIAL LAW. 3

TREATY OF TIENTSIN: *See* JURISDICTION. 1.

TRIAL.] A Judge sitting without a Jury in a civil action, as provided by the *Sierra Leone* Ordinance, No. 4 of 1866, sect. 11, has power to adjourn or postpone his judgment or verdict, and the Appellate Court will not interfere with his discretion either as to adjourning judgment, or allowing an amendment of the declaration, which may be granted after the Judge has begun to deliver his judgment. RAINY *v.* BRAVO - 287

VACANT SUCCESSION: *See* PRACTICE. 5.

VARIANCE BETWEEN DEFAMATORY WORDS ALLEGED IN DECLARATION AND PROOF: *See* LIBEL.

VICE-ADMIRALTY COURTS ABROAD. Construction of sect 40 of the Rules and Regulations relating to Vice-Admiralty Courts abroad: *See* PROXY.

VICES DU SOL: *See* COLONIAL LAW. 1.

WAR, IMMINENCE OF: *See* BREACH OF CONTRACT BY SHIPOWNER.

WILL: *See* COLONIAL LAW. 3, 4, 10; SEPARATE ESTATE OF MARRIED WOMAN.

1. The Statute of *Lower Canada* has engrafted on the old French Law an unlimited power of disposition by Will. HERSE *v.* DUFAUX - 468

2. —— Construction of bequests in a Will made in the *mystique* or secret form in accordance with the Code Civil, the Law prevailing in the *Mauritius*. LAGESSE *v.* LAGESSE - - - 553

WILL, NUNCUPATIVE: *See* COLONIAL LAW. 3.

WINDING-UP ORDINANCE OF NATAL, No. 19 of 1866: *See* PARTNERSHIP. 1.

BIBL. LOUBAIN

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS,
STAMFORD STREET AND CHARING CROSS.